TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

278
16

No. 24

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, AS MEMBERS, ETC., ET AL.

FILED NOVEMBER 16, 1927

(File No. 33,062)

No. 54

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED JANUARY 31, 1928

(33,174)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 24

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, AS MEMBERS, ETC., ET AL.

(File No. 33,082)

No. 54

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

(33,174)

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IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

In Equity

LEHIGH VALLEY RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS et als.,
Defendants

FINAL DECREE—Filed January 18, 1928

This cause came on to be heard at this term before a Statutory Court as provided by statute and was argued by counsel and thereupon, upon consideration thereof, it is on this 18th day of January, 1928,

Ordered that the motion to strike out the affirmative defence set up in Part II of the answer be and the same is hereby denied, and it is further

Ordered, adjudged and decreed that the bill of complaint be and the same is hereby dismissed.

J. Warren Davis, J. L. Bodine, Wm. N. Runyon,
Judges.

[fol. d] IN UNITED STATES DISTRICT COURT

In Equity

[Title omitted]

(On Final Hearing)

PETITION ON APPEAL FROM FINAL DECREE—Filed January 18, 1928

To the Honorable J. Warren Davis, Circuit Judge; Joseph L. Bodine and William N. Runyon, District Judges of the United States Court for the District of New Jersey:

Lehigh Valley Railroad Company, the above named plaintiff, feeling aggrieved by the final decree rendered and en-

tered in the above entitled cause on the 18th day of January, 1928, dismissing the bill of complaint herein, does hereby appeal from the final decree herein mentioned to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that a citation be issued as provided by law, and that a transcript of the record and proceedings and documents upon which said decree was based, duly authenticated, be sent to the said Supreme Court of the United States, under the rules of such court in such case made and provided.

Your petitioner shows that said final decree is not a money decree or one upon which an execution can be issued and that the only money judgment to which the defendants [fol. e] are entitled thereunder is for costs which will be suspended by the allowance of the appeal.

Your petitioner shows that in the above entitled cause the petitioner claims that the said order of the said Board of Public Utility Commissioners, and a statute of New Jersey entitled "A supplement to an act entitled 'An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty first, one thousand nine hundred and eleven" (N. J. P. L. 1913, p. 91,) and the act to which the same is a supplement (N. J. P. L. 1911, p. 374), as amended, under authority of which said order was made, as construed by this court as authorizing said order, are laws of the State of New Jersey conflicting with and in violation of the Constitution and laws of the United States, to wit: Article I, Section VIII, paragraph 3; Article I, Section X, paragraph 1; Article VI, Section II, and Article XIV, Section I, and the Act to regulate Commerce, as amended by the Transportation Act 1920.

Wherefore your petitioner prays that said appeal may be allowed and that, upon its giving bond in the amount to be approved by this court, said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the enforcement of said order of the said Board of Public Utility Commissioners.

Lehigh Valley Railroad Company, by Hobart & Minard, Solicitors for Plaintiff.

Service of within Petition of Appeal is hereby acknowledged this 18th day of January, 1928.

John O. Bigelow, Solicitor for Defendants.

[fol. f] In United States District Court

In Equity

[Title omitted]

Order Allowing Appeal from Final Decree and Supersedeas—Filed January 18, 1928

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to Lehigh Valley Railroad Company, petitioner herein, and plaintiff in this suit, from the final decree entered January 18, 1928, in the above entitled cause and that said appeal should be returnable to the Supreme Court of the United States, and that, upon the execution of a bond in the penalty of Five Hundred Dollars ($500.00) said appeal shall operate as a supersedeas of said final decree and shall suspend, until the final decree herein, the enforcement of a certain order of the Board of Public Utility Commissioners of the State of New Jersey, made April 26, 1927, directing the plaintiff to alter the crossing known as South Bridge Street, or State Highway Route No. 16, by substituting therefore a crossing not at grade of the said public highway; and directing the plaintiff to close the crossing at the Camp Lane and construct a connecting highway therefrom to said State Highway Route No. 16 in the Township of Hillsborough, County of Somerset, State of New Jersey, and that a transcript of the record, including all the exhibits offered in evidence, by either party, be filed in the Supreme Court of the United [fol. g] States, according to law, as prayed for.

J. Warren Davis, United States Circuit Judge. J. L. Bodine, Wm. N. Runyon, United States District Judges.

Signed and entered January 18, 1928.

Service of within order acknowledged this 18th day of January, 1928.

John O. Bigelow, Solicitor for Defendants.

[fol. h] In United States District Court

[Title omitted]

(On Final Hearing)

Assignment of Errors—Filed January 18, 1928

The Lehigh Valley Railroad Company by Hobart and Minard, its solicitors, comes and files the following assignment of errors wherein it says that the final decree of the United States District Court, for the District of New Jersey, made herein on the 18th day of January, 1928, is erroneous for the following reasons:

First. Said court erred in dismissing the bill of complaint.

And in refusing to grant to the plaintiff a permanent injunction, in accordance with the prayer of its bill of complaint, restraining the defendants and each of them from enforcing the order of the Board of Public Utility Commissioners of the State of New Jersey made on April 26, 1927, [fol. i] directing the plaintiff to alter the crossing known as South Bridge Street, or State Highway Route No. 16, by substituting therefor a crossing not at grade of the said public highway; and directing the plaintiff to close the crossing at Camp Lane and to construct a connecting highway therefrom to said State Highway Route No. 16, in the Township of Hillsborough, Somerset County, New Jersey.

Second. Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article I, Section VIII, Paragraph 3, reading as follows:

"The Congress shall have power • • •

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

And in not holding that the said order was in violation thereof.

Third. Said court erred in holding that the said order of said Board was not in violation of the Constitution of the United States, to wit, Article I, Section X, Paragraph 1, reading in part as follows:

"No state * * * shall pass any * * * law impairing the obligation of contracts."

And in not holding that the said order was in violation thereof.

[fol. j] Fourth. Said court erred in holding that the said order of said Board was not in violation of the Constitution of the United States, to wit, Article VI, Section II, reading in part as follows:

"This Constitution, and the laws of the United States, which shall be made in pursuance thereof; * * * shall be the supreme law of the land."

And in not holding that the said order was in violation thereof.

Fifth. Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

And in not holding that the said order was in violation thereof.

Sixth. Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

"Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

And in not holding that the said order was in violation thereof.

Seventh. Said court erred in holding that the said order of said Board did not impose upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance of way in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," ap- [fol. k] proved February 28, 1920, to wit, paragraphs (2), (3), and (4) of Section 422 thereof, now part of Section 15a of the act to regulate commerce.

And in not holding that said order did impose upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance of way, in conflict with said paragraphs of said "Transportation Act, 1920."

Eighth. Said court erred in holding that the said order of said Board did not create, constitute or impose an unreasonable or arbitrary requirement or burden upon, interference with, impediment of or discrimination against, the interstate commerce of the plaintiff, and did not otherwise impair the usefulness of its facilities therefor, in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit: paragraphs (3) and (4) of Section 416 thereof, now part of Section 13 of the act to regulate commerce.

And in not holding that said order did affect the interstate commerce of the plaintiff as aforesaid.

Ninth. Said court erred in holding that the said order of said Board was not an unreasonable exercise of the police power and did not thereby deprive the plaintiff of its property without due process of law.

And in not holding that said order was an unreasonable exercise of the police power and did thereby deprive the plaintiff of its property without due process of law.

Tenth. Said court erred in holding that the denial by the New Jersey Supreme Court of a review of said order of said Board did not deprive the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue [fol. l] whether said order of said Board confiscates the plaintiff's property.

And in not holding that said denial did deprive the plaintiff of such fair opportunity to submit said issue to such judicial tribunal for determination, as aforesaid.

Eleventh. Said court erred in holding that said order did not confiscate the property of the plaintiff for the benefit of other persons and did not deny to the plaintiff the equal protection of the laws.

And in not holding that said order did confiscate the property of the plaintiff and did deny the plaintiff the equal protection of the laws, as aforesaid.

Twelfth. Said court erred in holding that said order did not impair the obligation of a contract between the plaintiff and the State of New Jersey, to wit, a contract made between the plaintiff and the State Highway Commission, acting for and on behalf of the State of New Jersey, for the elimination of the grade crossing known as South Bridge Street, or State Highway Route No. 16, in the manner and according to the terms of the contract described in the bill of complaint and the affidavits and exhibits of the plaintiff.

And in not holding that said order did impair the obligation of said contract, as aforesaid.

Thirteenth. Said court erred in refusing to strike out the affirmative defense set up in Part II of the answer.

Fourteenth. Said court erred in holding that the statute of the State of New Jersey, entitled "A supplement to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers' approved April twenty-first, one thousand nine hundred and eleven," approved March 12, 1913 (N. J. P. L. 1913, p. 91) and the act to which the same is a supplement, (N. J. P. L. 1911, p. 374), as amended, under the authority of which said order was made, as construed [fol. m] by said New Jersey Supreme Court and by said District Court, did not violate the Constitution of the United States, to wit, Article I, Section VIII, paragraph 3, reading as follows:

"The Congress shall have power * * *

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

And in not holding that said statutes, as so construed, were in violation thereof.

Fifteenth. Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article I, Section X, paragraph 1, reading in part as follows:

"No state * * * shall pass any * * * law impairing the obligation of contracts."

And in not holding that said statutes, as so construed, were in violation thereof.

Sixteenth. Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article VI, Section II, reading in part as follows:

"This Constitution, and the laws of the United States, which shall be made in pursuance thereof; * * * shall be the supreme law of the land."

And in not holding that said statutes, as so construed, were in violation thereof.

Seventeenth. Said Court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article XIV, Section 1, reading in part as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

And in not holding that said statutes, as so construed, were in violation thereof.

[fol. 8] Eighteenth. Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article XIV, Section 1, reading in part as follows:

"Nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

And in not holding that said statutes, as so construed, were in violation thereof.

Nineteenth. Said court erred in holding that said statutes, as so construed, did not impose upon the plaintiff a

necessity for unreasonable expenditures for structures and maintenance-of-way in conflict with certain provisions of the act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (2), (3), and (4) of Section 422 thereof, now part of Section 15a of the act to regulate commerce.

And in not holding that said statutes, as so construed, were in conflict with said act, as aforesaid.

Twentieth. Said court erred in holding that said statutes, as so construed, did not create, constitute and impose an unreasonable and arbitrary requirement and burden upon, interference with, impediment of and discrimination against, the interstate commerce of the plaintiff, and otherwise impair the usefulness of its facilities therefor, in conflict with certain provisions of the act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (3) and (4) of Section 416 thereof, now part of Section 13 of the act to regulate commerce.

And in not holding that said statutes, as so construed were in conflict with said act, as aforesaid.

Twenty-first. Said court erred in holding that said statutes, as so construed, did not constitute an unreasonable [fol. 6] exercise of the police power and thereby deprive the plaintiff of its property without due process of law.

And in not holding that said statutes did constitute an unreasonable exercise of the police power and did thereby deprive the plaintiff of its property without due process of law, as aforesaid.

Twenty-second. Said court erred in holding that said statutes, as so construed, did not confiscate the property of the plaintiff for the benefit of other persons, and deny to the plaintiff the equal protection of the laws.

And in not holding that said statutes, as so construed, did confiscate the property of the plaintiff and deny to the plaintiff the equal protection of the laws, as aforesaid.

Twenty-third. Said court erred in holding that said statutes, as so construed, did not impair the obligation of a contract between the plaintiff and the State of New Jersey, to wit, a contract made between the plaintiff and the State

Highway Commission, acting for and in behalf of the State of New Jersey, for the elimination of the grade crossing known as South Bridge Street, or State Highway Route No. 16, in the manner and according to the terms of the contract described in the bill of complaint and the affidavits and exhibits of the plaintiff.

And in not holding that said statutes, as so construed, did impair the obligation of said contract, as aforesaid.

Twenty-fourth. Said court erred in holding that said statutes as so construed, did not deprive the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property.

[fol. p] And in not holding that said statutes, as so construed, did deprive the plaintiff of such fair opportunity to submit said issue to such judicial tribunal for determination, as aforesaid.

Wherefore the plaintiff prays that the said final decree of the United States District Court, for the District of New Jersey, be reversed, and that the said Court may be directed to enter a final decree in accordance with the prayer of the bill.

Hobart & Minard, Solicitors for Plaintiff.

Service of within Assignment of Errors is hereby acknowledged this 18th day of January, 1928.

John O. Bigelow, Solicitor for Defendants.

[fols. q & r] Citation, in usual form, showing service on John O. Bigelow, filed January 18, 1928, omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

(On Appeal from Final Decree)

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 18, 1928

The plaintiff, Lehigh Valley Railroad Company, having appealed to the Supreme Court of the United States from a final decree entered herein on final hearing before a statutory court, as provided by Section 266 of the Judicial Code, hereby requests the clerk of this court, pursuant to the rules of said Supreme Court, to prepare a transcript of the following record herein, to be filed in the office of the Clerk of the said Supreme Court, to wit:

Petition of Appeal.
Order Allowing Appeal & Supersedeas.
Assignment of Errors.
Citation.
Final Decree.
Praecipe.

[fol. 1] Bill, Affidavits and Exhibits for the Plaintiff

Bill of complaint, and
Exhibit "A" annexed to bill of complaint, P. U. C. Order, April 26, 1927, and plan adopted by the Board.
Affidavit of Duane E. Minard, of May 31, 1927.
Affidavit of William R. Johnston of May 31, 1927.
Exhibit "A," annexed to Johnston affidavit May 31, 1927, (Board's order of November 24, 1926, instituting proceedings).
Exhibit "B," Board's decision.
Exhibit "C," plan "C."

Supplemental Affidavits and Exhibits

Affidavit of William R. Johnston, June 2, 1927.
Exhibit "D," schedule of highway curves.
Exhibit "E," Record and minutes of State Highway Commission, respecting State Highway Route No. 16.
Exhibit "F," Plan "C" as signed by the parties. (Consisting of six blueprint sheets).

Exhibit "G," Camp Lane Plan.
Exhibit "H," Board's profile.
Exhibit "I," Railroad estimate.
Exhibit "J," Mead's estimate.
Affidavit of George T. Hand.
Affidavit of C. E. Hildum.
Affidavit of Charles R. Vanneman.
Affidavit of Walter Steele.
Affidavit of George C. Diehl.
Exhibit "K," certified copy of record of laying out State Highway Route No. 16.

Affidavits and Exhibits for the Defendant

Affidavit of Charles F. Bestwell, June 8, 1927.
Affidavit of A. Lee Grover, June 10, 1927.
Affidavit of Charles A. Mead, June 8, 1927.
Affidavit of H. P. Brainard, June 9, 1927.
[fol. u] Affidavit of Alfred N. Barber, June 9, 1927.
Justice Parker's Memorandum opinion, denying application for writ of certiorari.
Supreme Court Order, June 6, 1927, denying application for writ of certiorari.
Answer of defendant, Board of Public Utility Commissioners.
Notice of motion to strike out the affirmative defense set up as Part II, of the answer.
Stipulation continuing argument of said motion until final hearing.
Stipulation of the Record; including all of the foregoing items, and the following testimony and exhibits in addition thereto.
Testimony taken before the Board of Public Utility Commissioners.
The following additional exhibits offered at the hearings before said Board:

(a) Exhibit C-4, a composite of 16 photographs, 8 of the crossing on State Highway Route #16 and 8 of the crossing on Camp Lane.

(b) Exhibit C-5, Traffic Count at the crossing on State Highway Route #16.

(c) Exhibit C 6, State Geological Survey Map, Somerville Sheet, (being the same as "Exhibit 1, Montgomery Township" and "Exhibit 2, Montgomery Township").

(d) Exhibit S-1, Report of Thomas J. Wasser. Verified statement of C. E. Hildum, dated Jan. 10, 1928, of net Railway Operating Income up to Nov. 30, 1927. (Exhibit "L.")

Clerk's certificate to transcript of record.

Said transcript to be prepared as required by law and rules of the Supreme Court of the United States.

Hobart & Minard, Solicitors for Plaintiff.

Service of within Praecipe acknowledged this 18th day of January, 1928.

John O. Bigelow, Solicitor of Defendants.

[fol. v] [NOTE.—This opinion taken from record in case No. 24 as per stipulation.]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

In Equity

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS ET ALS., Defendants

Under Section 266 of the Judicial Code

Memorandum

Messrs. Hobart & Minard for the plaintiff.

Messrs. John O. Bigelow, John W. Queen and Clarence E. Case for the defendants.

Before Davis, Circuit Judge, and Bodine and Runyon, District Judges

OPINION—Filed June 28, 1927

BODINE, District Judge:

This is an application for an Interlocutory Injunction to restrain the Public Utility Commissioners of New Jersey

from carrying into effect an order made April 26, 1927, directing the Lehigh Valley Railroad Company to eliminate a grade crossing on State Highway #16 at a place in the township of Hillsboro, Somerset County, where the highway now crosses the four track roadbed of the Railroad Company. The Railroad Company does not contend that the Public Utility Commissioners had no right to order the elimination of this crossing (conceding that it is a highly dangerous one), but the contention is that the plan adopted for the elimination is unreasonable, and that the board should have ordered the elimination according to the proposed plan of the Railroad Company.

"The State, in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them. But its power to regulate is not unlimited. It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business. Mississippi Railroad Commission v. Mobile & Ohio R. R. Co., 244 U. S. 388, 390, 391. The validity of regulatory measures may be challenged on the ground that they transgress the Constitution; and thereupon it becomes the duty of the court, in the light of the facts in the case, to determine whether the regulation is reasonable, valid or essentially unreasonable, arbitrary and void." Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74.

The court in determining what is reasonable does not substitute its own judgment for the determination of the Commission, but does consider all the factors in the case. New York v. Public Service Commission, 269 U. S. 244.

The plan of the Railroad Company calls for locating a new highway to the east of the present highway in a bow shape joining the present highway at a point a thousand feet distant in either direction from the existing line of the railroad. The bow would have three distinct curves, the greatest curve being six per cent. The plan of both parties calls for the closing of what is known as the Camp Lane crossing, an unnecessary crossing in the vicinity, and extending this by-road up to the proposed new crossing. The Public Utility Commissioners' plan requires the ex-

penditure of possibly $175,000 more than called for by the railroad plan. If, however the cost of acquiring additional lands is taken into account, this amount would undoubtedly be considerably reduced, as found by the Commission and Justice Parker.

[fol. w] The Board's plan maintains the existing highway, in its existing straight course, a course followed for more than a century. A somewhat greater amount of support for the railroad is required, in that the railroad and the highway run obliquely to one another. The railroad's plan, by the incorporation of the three curves, provides for the under cut at something more nearly approaching a right angle thereby lessening the cost of support of the roadbed.

The highway in question is an increasingly important artery of travel in this state. The railroad crosses the highway on an embankment 8 feet higher than the general level of the highway. Automobiles passing the railroad track are obliged to ascend this embankment and cross the railroad at grade. The count shows that thousands of automobiles now daily pass. The railroad's plan provides for inserting in the highway three curves contrary to the declared intention of the Legislature to eliminate curves, and contrary to the general policy of railroads to eliminate curves wherever possible in their line of travel.

In the vicinity of the crossing is a public school. School children of tender age nearly always pass on foot. The Public Utility Commissioners' plan provides for suitable footwalks under the railroad. Their decision is couched in exhaustive terms and was reached after careful consideration of all the evidence, after examining the place and hearing the testimony of all the interested parties.

The Railroad Company immediately applied to Mr. Justice Parker for a writ of certiorari with a stay. Justice Parker, after a full hearing, determined that the Public Utility Commissioners had jurisdiction, and that their action was, in all respects, proper and a reasonable exercise of the power vested in them by the Legislature of the State. Justice Parker said:

"The requirement of a straight road at such a place as this is essentially sound, and to turn a great State road at such a place from a straight line to a crooked one would be to court constant disaster."

The Railroad Company then applied to the Supreme Court in banc for a writ of certiorari. This application was denied. They now seek to have this court restrain the action of the Public Utility Commissioners as an unreasonable exercise of the police power of the State, on the theory that the only reasonable exercise of the police power would be to convert this highway from a straight course into a crooked course with a maximum saving of not more than $175,000. This court is asked to say that it is unreasonable to secure to the traveling public a straight passage under a railroad right of way over an existing highway where such passage will cost the railroad company twice as much as another sort of crossing that will compel, for all time, the traveling public to go around three curves and a longer distance to arrive at the same place.

The action of the Public Utility Commissioners would seem to be most reasonable. The mere fact that they did not choose the cheapest method does not make their act unreasonable, when there are perfectly good reasons for the choice. The court is not obliged to choose between two methods. It is enough that the action ordered is reasonable.

Prior to the action of the Public Utility Commissioners, the State Highway Board had considered changing the route of the State Highway to meet the plans of the Railroad Company. No action was taken, however, beyond discussion; no contract was signed and the Highway Board requested initiation of the action taken by the Public Utility Commissioners and now under review.

[fol. x-18] The Public Utility Commissioners under section 5 of Chapter 57, of the act of 1913 (P. L. 1913) have power to proceed with respect to the elimination of any grade crossing. The mere fact that the Railroad Company and the State Highway Commission, for a period of time, discussed the elimination of the crossing does not, in any way, interfere with the action taken by the Public Utility Commissioners. It may also under section 1 of the act of 1913, order the relocation of any public highway at a point where it crosses the railroad right of way.

In the case of Erie R. R. Co. v. Public Utility Commrs., 254 U. S. 395, the power of the Public Utility Commissioners to eliminate grade crossings was sustained by the Su-

preme Court, speaking through Mr. Justice Holmes, as follows:

"If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

The Railroad contends that the Transportation Act of 1920 has modified this decision, citing the Los Angeles station case, 264 U. S. 331. We do not, however, find that the Supreme Court said that the "unquestioned" police power to regulate grade crossings in the interest of public safety was in anywise affected by the Transportation Act. And since counsel for the railroad company in their brief say that, "If the Board had ordered a reasonable expenditure according to plan 'C' (the railroad plan), the points we now present would not be well founded," it seems unnecessary to further consider the points raised with respect to the Transportation Act. Certainly, a fair return upon railroad property was never intended to be secured at the peril of the public using the highways of a state.

The injunction should be denied with costs.

Bill of Complaint.

Filed June 1, 1927.

IN THE

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

LEHIGH VALLEY RAILROAD COMPANY, a corporation, Plaintiff, vs. BOARD OF PUBLIC UTILITY COMMISSIONERS; JOSEPH F. AUTENREITH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members of and constituting the commission designated and known as the Board of Public Utility Commissioners; EDWARD L. KATZENBACH, Attorney General; and FRANCIS L. BERGEN, Prosecutor of the Pleas of Somerset County; all of the State of New Jersey, Defendants.	In Equity.

To the Judges of the District Court of the United States in and for the District of New Jersey:

The plaintiff, Lehigh Valley Railroad Company, a corporation, above named, files its complaint herein, and for its cause of action respectfully shows unto your Honors:

FIRST: It is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Penn-

sylvania, and a resident and citizen of said State, duly authorized to transact business in the State of New Jersey and having its registered office in said State at No. 1 Exchange Place, Jersey City; it has been for many years past, and is now engaged in the operation of a railroad in and through the States of Pennsylvania, New York and New Jersey, and is engaged as a common carrier in the transportation of passengers and freight by rail from and to points in the State of New Jersey and other states, and is and was at all times hereinafter mentioned, a common carrier of passengers and freight by rail, and subject to the provisions of the Act of Congress known as the "Interstate Commerce Act" and the Act of Congress known as the "Transportation Act, 1920."

SECOND: The defendant Board of Public Utility Commissioners of the State of New Jersey was created and exists by virtue of an Act of the Legislature of New Jersey entitled "An Act concerning public utilities; to create a Board of Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, and the various supplements thereto and amendments thereof, and has its principal office in the City of Trenton and State of New Jersey.

The defendant Joseph F. Autenreith is the President of said Board of Public Utility Commissioners, and is a citizen of the State of New Jersey and a resident of the City of Jersey City in said State.

The defendant Frederick W. Gnichtel is a citizen of the State of New Jersey, and a resident of the City of Trenton in said State.

The defendant Charles Browne is a citizen of the State of New Jersey, and a resident of the Borough of Princeton in said State.

The said three last-named defendants are the duly appointed, qualified and acting members of said Board of Public Utility Commissioners of the State of New Jersey.

The defendant Edward L. Katzenbach is a citizen of the State of New Jersey, and a resident of the City of Trenton in said State, and is the duly elected, qualified and acting Attorney General of the State of New Jersey.

The defendant Francis L. Bergen is a citizen of the State of New Jersey, and a resident of the Borough of Somerville, and is the duly elected, qualified and acting Prosecutor of the Pleas of the County of Somerset in said State.

THIRD: This case is between citizens of separate states and involves questions arising under the Constitution and Laws of the United States and particularly under the Commerce Clause of, and the Fourteenth Amendment to, said Constitution and the Acts of Congress known as the "Interstate Commerce Act" and the Act of Congress known as the "Transportation Act, 1920," and the amount involved is in excess of $3,000, exclusive of interest and costs. The action is of a civil nature and involves the duty of the plaintiff to comply with an order made April 26, 1927, by the defendant Board of Public Utility Commissioners, requiring the plaintiff to eliminate certain grade crossings in the Township of Hillsborough, in the County of Somerset and State of New Jersey, known as State Highway Route No. 16 (or South Bridge Street Extension), and Camp Lane (or Somerville Road), in the respects in which said order is in conflict with and in violation of the Constitution and Laws of the United States, and of the State of New Jersey.

FOURTH: By order made November 24, 1926, the defendant Board of Public Utility Commissioners, by virtue of alleged powers conferred by statute, namely, Chapter

57, Laws of New Jersey for 1913 (p. 91), entitled, "A Supplement to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers;' approved April twenty first, One thousand nine hundred eleven," approved March 12, 1913, made and issued its order initiating a proceedings entitled, "In the matter of proceedings under Chapter 57, P. L. 1913, relating to the crossing of the highway known as South Broad Street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsborough Township, Somerset County, and called a hearing to determine whether South Broad Street or State Highway Route No. 16 was a public highway and whether it crosses in the Township of Hillsborough the railroad operated by Lehigh Valley Railroad Company, and whether such crossing was dangerous to public safety or whether public travel on said highway was impeded by such crossing and to determine what, if any, order should be issued by said Board for the alteration of said crossing by substituting therefor a crossing not at grade of such public highway under or over said railroad, or by reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of said highway and the opening of a new highway in the place of the one ordered vacated and to determine any and all other matters, the determination of which may be within the power of said Board and which might be involved in and incidental to the separation of the grades of said highway and of said railroad. In said order it was stated that any order issued by the Board in this proceedings "may affect a road known as Camp Lane in said Township of Hillsborough, which is or may be claimed to be a public highway"; and fixing a time and place for hearing in said proceedings and directing notice to be served

upon the parties therein named, including the plaintiff, Lehigh Valley Railroad Company.

FIFTH: Hearings in said proceedings were held before the defendant Board of Public Utility Commissioners and on April 26, 1927, said Board of Public Utility Commissioners made and issued its order with plan attached thereto, and made a part thereof, a true copy of which order and plan are annexed hereto as Exhibit "A."

SIXTH: Prior to the institution of the proceedings by the Board of Public Utility Commissioners negotiations had been conducted between the Railroad Company and the State Highway Commission of the State of New Jersey from December, 1922, until March 11, 1924, when the State Highway Commission, pursuant to the authority conferred upon it by law, by resolution adopted by said Commission on that date, adopted a plan known as Plan "C," which called for the relocation of said highway at the crossing so as to create an undercrossing for said highway at a point four hundred feet east of the present location of suitable width and character to conform to the locality in which the same was situated and to the plans of the State Highway Commission for the permanent improvement of said highway. Said plan was officially signed and approved, pursuant to the authority of said State Highway Commission, by William G. Sloan, State Highway Engineer, and John A. Vogel, Bridge Engineer of the State Highway Commission, and by George T. Hand, Chief Engineer, and F. E. Schall, Bridge Engineer of the Lehigh Valley Railroad Company.

SEVENTH: Pursuant to resolution adopted by the State Highway Commission on March 11, 1924, the State Highway Engineer, on March 13, 1924, advised the Chief Engineer of the Railroad Company of the State Highway Commission's willingness to proceed with the work of

eliminating said grade crossing in accordance with Plan "C" and asked the Railroad Company to draft an agreement in writing for that purpose. Such an agreement was prepared and approved as to terms and form by the Railroad Company and the State Highway Commission, and the Railroad Company proceeded with the preliminary work for carrying out said plan, including the preparation of detailed plans involving an expenditure of $2,800.00, and the relocation of certain crossover tracks necessary to be changed for the purposes of said plan at a cost of $2,194.13. The execution of said agreement was deferred by the State Highway Commission and on March 24, 1925, the State Highway Commission adopted a motion for an application to be made to the Public Utility Commission for the elimination of said crossing, but no such application was made by the State Highway Commission or by any other person, board or body, and the Board of Public Utility Commissioners of its own motion, and without any lawful authority, instituted the proceedings as aforesaid.

EIGHTH: The plan adopted by said Board was estimated to cost $324,400.00, while the plan approved by the State Highway Commission, with certain modifications, presented by the Railroad Company at the hearing was estimated to cost $205,184.70, including property damages. Said Plan "C" was an entirely feasible and practicable plan and sufficient to meet the requirements of the locality in which the crossing is located and to reasonably comply with all the requirements of public convenience and necessity and fully meet all obligations and duties imposed upon the Railroad Company by law.

NINTH: Said order and plan of the Board of Public Utility Commissioners

(a) Imposed upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance of

way in violation of Paragraph 2, Section 15 of the Act to Regulate Commerce as amended by the Transportation Act of 1920.

(b) Imposed upon the interstate commerce of the plaintiff an unreasonable and arbitrary requirement and constituted a direct interference with its commerce among the states and imposed a direct burden upon and impediment of said interstate commerce and created a discrimination against interstate commerce and otherwise impaired the usefulness of its facilities for such commerce in violation of Article 1, Section 8, Paragraph 3 (known as the Commerce Clause) of the Constitution of the United States.

(c) Was an unreasonable exercise of the police power and thereby deprived the plaintiff of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(d) Confiscated the property of the plaintiff for the benefit of other persons and took its property for public use without just compensation, and denied to the plaintiff the equal protection of the laws and impaired the obligation of the contract between the plaintiff and the State of New Jersey.

TENTH: Said order is unlawful and in violation of the Constitution of the State of New Jersey and of the statute by authority of which it purports to be made in the following respects:

(a) Said Board was without authority to institute any proceedings or make any order for the elimination of said grade crossing because under the provision of an act to establish the State Highway system and an act to establish the State Highway Department, as enacted by the Legislature of the State of New Jersey, the State Highway Commission was given and possessed complete and exclusive

jurisdiction over said State Highway Route Number 16 and over the crossing in question.

(b) Said Board had no jurisdiction to order a sixty six foot undercrossing because the legal width of said highway is but thirty-three feet and unless otherwise directed and the act to establish a state highway system Section 6 provides that unless the State Highway Commission shall deem necessary and determine that a greater width is required, the highway in question was not required by law to exceed thirty feet in width.

(c) There was no evidence to show that the construction of a connecting highway between Route Number 16 and the road known as Camp Lane was reasonably necessary, required or appropriate for the elimination of the crossings or either of them.

(d) The Board was without jurisdiction to order the elimination of a crossing at Camp Lane, as there was no evidence to show that said crossing was dangerous to public safety or that the public travel on said highway was impeded thereby.

ELEVENTH: On May 14th, 1927, the plaintiff applied to his Honor Charles W. Parker, a Justice of the Supreme Court for the State of New Jersey, for a writ of certiorari, that being the proper remedy under the laws and practice of New Jersey, to review said order of the Board of Public Utility Commissioners. Said application was supported by affidavit as required by law and the practice of the Supreme Court, State of New Jersey, and on May 17, 1927, said application was denied. Arrangements were immediately made for an application to the Supreme Court *in banc*, but that Court not being in session, the 23rd of May, 1927, was the earliest day upon which such application could be made and on that date the plaintiff applied to the Supreme Court *in banc* for writ of certiorari to

review said order. On May 31st, 1927, plaintiff was informed by telegram from the Clerk of the New Jersey Supreme Court that that application had been denied. Plaintiff has therefore exhausted the remedies at law available under the laws and practice of the State of New Jersey for the review of said order.

TWELFTH: Said order requires that the plaintiff begin the actual work required for the performance and execution of said order on or before the first of June, 1927, and perform and fully comply with the directions and requirements of said order and complete all of the work required there to be done within one year thereafter, or the first day of June, 1928. The act concerning Public Utilities, et als, under which said Board of Public Utility Commission exercises its power and authority and under which said order was made, provides that in default of compliance with any order of the Board when the same shall become effective, the person or public utility affected thereby shall be subject to a penalty of $100 per day for every day during which such default continues, to be recovered in an action of debt in the name of the state and the observance of the orders of the Board may be enforced by mandamus or injunction in appropriate cases or by suit to compel the specific performance of the orders so made. Said act also provides that any person who shall knowingly and willfully neglect, fail or omit to do or perform, or who shall knowingly or willfully cause or join or participate with others in causing any public utility corporation or company to neglect, fail or omit to do or perform, or who shall advise, solicit, or persuade or knowingly or willfully instruct, direct or order any officer, agent or employee of any public utility corporation or company to neglect, fail or omit to do any act or thing required to be done by said act, including the compliance with said order, shall be guilty of misdemeanor. Under

the Crimes Act of New Jersey a misdemeanor is punishable by a fine of not exceeding $1,000 or by imprisonment, with or without hard labor, as the court may direct, for a term not exceeding three years or both.

THIRTEENTH: The defendants Joseph F. Autenreith, Frederick W. Gnichtel and Charles Browne, as members of said Board of Public Utility Commissioners and the defendant Edward L. Katzenbach, as Attorney General of the State of New Jersey, and the defendant Francis L. Bergen, as Prosecutor of the Pleas of Somerset County, threaten the plaintiff, its officers and agents with prosecution under the laws of New Jersey to coerce the plaintiff and to compel it by the imposition of penalties, fines and imprisonment and by mandamus or injunction, to comply with said order and to begin the actual work thereunder on the first day of June, 1927, all of which items, threats and coercions will be carried out unless defendants are restrained by this Honorable Court. Unless so restrained, said defendants will institute numerous suits and prosecutions against the plaintiff, its officers and agents to compel the compliance with said order and subject the plaintiff to innumerable actions and prosecutions for the recovery of excessive fines and penalties, and its agents will be thereby intimidated and coerced and the plaintiff will be wrongfully deprived of large sums of money that will be irretrievable loss to plaintiff, to its great and irreparable damage and injury.

WHEREFORE, since it is without adequate remedy at law for its protection in this matter, the plaintiff prays:

(1) That defendants and each of them, their successors in office, their servants, employees, agents or other parties acting under the control or authority of each and all of said defendants, be enjoined from commencing any suit or proceedings to enforce the provisions of the laws

of New Jersey, and said order, against the plaintiff by reason of anything done or omitted to be done by the plaintiff, or doing any act, or molesting and interfering with the plaintiff, its officers, agents, servants or employees.

(2) That said order, to the extent that and in the respect in which its enforcement will bring them into conflict with said act to regulate commerce and said Transportation Act of 1920, and the constitutional rights of the plaintiff be declared to be null and void.

(3) That pending the issuance of a perpetual injunction herein, this Honorable Court may grant a preliminary injunction herein restraining the said defendants, their successors in office and their employees, agents and servants and each of them, from doing any of the above-mentioned acts until the final hearing or the further order of this court; and that before the hearing and determination of plaintiff's application for a preliminary injunction, this Honorable Court may grant a temporary restraining order restraining the said defendants and successors in office, and their employees, agents and servants and each of them, from doing any of the above-mentioned acts until the hearing and determination of plaintiff's application for a preliminary injunction herein.

Plaintiff prays not only a writ of injunction conformable to the prayer, but also that subpoena of the United States of America, issue out of and under the seal of this Honorable Court, directed to the defendants, Board of Public Utility Commissioners, Joseph F. Autenreith, Frederick W. Gnichtel, Charles Browne, as members of and constituting the commission designated and known as the Board of Public Utility Commissioners and Edward L. Katzenbach, Attorney General of the State of New Jersey; Francis L. Bergen, Prosecutor of the Pleas of Somerset County, thereby commanding them and each of them

on a certain day therein to be named, to be and appear before this Honorable Court then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular in the premises and to perform and abide by such order, direction or decree as may be made in the premises and that on final hearing herein, said order of injunction may be made perpetual, and for such other relief as to your Honor may seem meet, and the plaintiff will ever pray.

LEHIGH VALLEY RAILROAD COMPANY,

By HOBART & MINARD,
Solicitors.

GEORGE S. HOBART,
DUANE E. MINARD,
of Counsel.

Read on application June 1st, 1927.

WM. N. RUNYON,
U. S. Judge.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

WILLIAM R. JOHNSTON, being duly sworn, on his oath deposes and says that he is the Engineer of grade crossings of the plaintiff, and as such is authorized to make this affidavit in its behalf; he has read the above and foregoing Bill of Complaint and knows the contents thereof and that the same is true in substance and in fact.

WILLIAM R. JOHNSTON.

Sworn and subscribed to at Newark, N. J.,
this 31st day of May, 1927, before me
MORTIMER EISNER,
An Attorney at Law of New Jersey.

Exhibit "A" annexed to Bill of Complaint, P. U. C. Order April 26, 1927, and Plan adopted by Board included in Volume II (Exhibits) at page 1, and Exhibit "A" annexed to Johnston affidavit, May 31, 1927 (order of November 24, 1926) included in Volume II (Exhibits) at page 4.

Affidavit of Duane E. Minard.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

DUANE E. MINARD, of full age, being duly sworn, on his oath deposes and says that he is a counsellor at law of the State of New Jersey, and a member of the firm of Hobart & Minard, solicitors for the plaintiff, and as such has participated in the actual conduct of this matter.

On May 14, 1927, plaintiff applied to the Honorable Charles W. Parker, a Justice of the Supreme Court of the State of New Jersey, for a writ of certiorari to review the order of the Board of Public Utility Commissioners set forth in the foregoing bill of complaint. Said application was made on notice to all parties interested and was made on the first day on which such application could be heard. Said application was supported by affidavit as required by law and the practice of the Supreme Court of the said State.

On May 17, 1927, said application was denied without prejudice to renewing the application before the Supreme Court *in banc*. Arrangements were immediately made for such an application, but that Court not being in session, the 23rd day of May, 1927, was fixed by said Court as the earliest day on which such application could be heard and on that date the plaintiff applied to the Supreme Court *in banc*. At the request of the defendants a

decision on that application was deferred for five days to give them an opportunity to file answering briefs.

On May 31, 1927, at 10 o'clock in the forenoon, plaintiff's solicitors received a telegram from the Clerk of the New Jersey Supreme Court stating that the last mentioned application had been denied. Plaintiff has, therefore, exhausted remedies available at law, under the laws and practice of the State of New Jersey, for the review of said order.

DUANE E. MINARD.

Sworn and subscribed before me
this 31st day of May, 1927.

AUGUSTINE J. KELLY,
An Att'y at Law of N. J.

Affidavit of William R. Johnston.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

WILLIAM R. JOHNSTON, being duly sworn according to law, on his oath says: he is the engineer of grade crossings of Lehigh Valley Railroad Company.

Lehigh Valley Railroad Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and has been for many years in the past and is now engaged in operating a railroad into and through the States of Pennsylvania, New York and New Jersey, and is engaged as a common carrier in the transportation of passengers and freight by rail from and to points in the State of New Jersey and other states, and has a registered office for the transaction of business at #1 Exchange Place, Jersey City, New Jersey, and is duly authorized by law to operate its railroad

through and transact business in the State of New Jersey, and that it is and was at all the times hereinafter mentioned a common carrier of passengers and freight by rail and subject to the provisions of the act of Congress known as the "Interstate Commerce Act" and the act of Congress known as "Transportation Act, 1920." He is familiar with the railroad of Lehigh Valley Railroad Company throughout its entire system and with the character and nature of construction work of railroads, highways and bridges and the cost thereof.

State Highway Route No. 16 of the Highway System of the State of New Jersey crosses the railroad of the Lehigh Valley Railroad Company, in a general direction of northeasterly and southwesterly, at grade in the Township of Hillsborough, Somerset County, N. J., at an angle of 29 degrees with approaches on either side at the grade of substantially five per cent. for a distance of 125 feet from the tracks. At the present time and for some years past, the right-of-way of the railroad company at this crossing is and has been of a width of 100 feet and is occupied by four main operating tracks and the various railroad appurtenances. Said railroad company also owns at that point additional other property outside of the 100 foot right-of-way on either side of the highway.

At a point about 230 feet east of the center line of the present crossing is a station on the westbound side of the Prosecutor's railroad known as "Royce Valley," used for the general purposes of the Railroad's business in the transportation of passengers and freight. There is also a platform on the eastbound side maintained by the Railroad Company at a point 105 feet westerly of the center line of Route No. 16 used for the loading and unloading of milk to and from the trains of the Railroad Company.

There are driveways leading from Route No. 16 to said station and milk platform which are located on the Rail-

road Company's property. There are also provided other appurtenances for the handling of the Railroad Company's business at that station, including a weighing scales to weigh freight.

The legal width of said Highway Route No. 16 at and in the vicinity of said crossing is 33 feet and the travelled portion of said highway throughout its distance is an average of 20 feet, including an improved modern pavement 18 feet wide. This highway was formerly a county road of the County of Somerset and was taken over by the State Highway Commission by resolution adopted April 13, 1920.

At a point about 1400 feet easterly of the grade crossing of Highway Route No. 16 there is another grade crossing of either a township or county road, known as Camp Lane Road, which branches off from Highway Route No. 16 at a point 1220 feet north of the railroad tracks and runs in a southeasterly direction across said railroad at a practically level grade crossing.

In December, 1922, negotiations were opened between the Railroad Company and the State Highway Commission for the purpose of considering a plan for the elimination of this crossing. These negotiations continued until March 11, 1924, when the State Highway Commission adopted the following resolution with reference thereto (Minutes of meeting, March 11, 1924, page 8):

> "State Highway Engineer Sloan presented for the consideration of the Commission, alternate schemes for grade crossing elimination in South Somerville, in which he recommended the adoption of plan 'C' at a total estimated cost of $109,024.00, involving a structure with a center pier in the highway, leaving the 18' of roadway on each side of the pier, the Railroad Company to share in the cost of this improvement to the extent of $40,000.00. On

motion by Mr. Kidde, seconded by Mr. Jellin, the State Highway Commission approved plan 'C' for the elimination of Lehigh Valley Railroad Crossing at South Somerville and directed that this elimination be proceeded with and that $40,000.00 be accepted from the Lehigh Valley Railroad Company as its proportionate share of the cost."

Plan "C" contemplated the closing and abandonment of the existing crossing and the relocation of the highway crossing at a point about 400 feet east of the present location of the crossing. Said new crossing to be reached by a relocated portion of the highway, the terminii of which are located 950 feet easterly of the existing crossing and 1300 feet westerly thereof, respectively.

Some objection having been made by the Board of Freeholders of Somerset County to the relocation of the highway as proposed by Plan "C," the matter was given further consideration by the State Highway Commission with the result that on April 22, 1924, the Commission adopted the following resolution (Minutes of Meeting, April 22, 1924, page 5):

"The Secretary presented a resolution from the Somerset County Board of Freeholders disapproving of the proposed East Route under the Lehigh Valley Railroad at South Somerville and expressing their approval of the present line as followed by Route #16 at this point. In this connection Mr. Kidde moved that the Somerset County Board of Freeholders be advised that the action in adopting this new line had already been taken by the Commission on account of the considerable saving that would be effected thereby, and the further fact that the curve involved was only a six degree curve which is not considered serious by the State High-

way Commission, and also the fact that a much shorter under-pass and speedier construction would be accomplished by means of the new line as adopted."

Having been informed on March 13, 1924, that the Commission was willing to proceed with the elimination in accordance with Plan "C" (as authorized in resolution of the State Highway Commission of March 11, 1924) the Railroad Company proceeded to take up and relay cross-over tracks and to do other work preliminary to and necessary for the construction of the under-crossing contemplated by Plan "C" and in that connection incurred an actual expenditure of $2,194.13. Also the Railroad Company proceeded with and completed a complete set of detailed plans for the relocation and reconstruction of said crossing in accordance with Plan "C" and in connection with said negotiations the Railroad Company incurred engineering expenses amounting to approximately $2,800, which plans were duly completed and officially approved and signed by the officials of both the Railroad Company and the State Highway Commission in the form advised Nov. 8, 1924.

Pursuant to the resolution of the State Highway Commission adopted March 11, 1924, the State Highway Engineer on March 13, 1924, advised the Chief Engineer of the Railroad Company of the State Highway Commission's willingness to proceed with the work of eliminating said grade crossing on the basis therein provided in accordance with Plan "C" and asked the Railroad Company to draft an agreement in writing for that purpose. On June 25, 1924, the State Highway Commission approved Plan "C" except that it requested a slight flattening of the highway curves and the Highway Commission furnished the Commission's plan of alignment and profile of approaches in

accordance with that suggestion, which were accepted and adopted by the Railroad Company.

On Oct. 14, 1924, the Chief Engineer of the Railroad Company sent to the State Highway Engineer a draft of agreement covering the proposed elimination in accordance with Plan "C," with the curves revised as requested. On Oct. 17, 1924, detailed and general plans were forwarded by the Railroad Company to the State Highway Engineer for his approval and on Nov. 11, 1924, the Chief Engineer of the Railroad Company sent to the State Highway Engineer for approval a blue print of the plan revised under date of Nov. 8, 1924, showing curves flattened to 6 degrees as previously suggested by the State Highway Engineer.

On Dec. 12, 1924, general and detailed plans as revised were approved and signed on behalf of the State Highway Commission by W. G. Sloan, State Highway Engineer, and John A. Vogel, Bridge Engineer, said plans having already been signed on behalf of the Railroad Company by George T. Hand, Chief Engineer, and F. E. Schall, Bridge Engineer. No objection was made by the State Highway Commission to any of the terms of the agreement as submitted on Oct. 14, 1924, except certain minor changes which were agreed to by the Railroad Company and the Commission was advised accordingly, and no change whatever was requested in the detailed and general plans of Plan "C" as submitted to the State Highway Commission and signed and approved by the Chief Engineers and Bridge Engineers of the State Highway Commission and the Railroad Company on Dec. 12, 1924, and thereupon the Railroad Company proceeded with the work heretofore described. It was not until June 1, 1925, that the Railroad Company received any advice or notice from the State Highway Commission that it would refrain from executing the agreement for this work.

On Nov. 24, 1926, the Board of Public Utility Commissioners of the State of New Jersey issued an order, copy of which is attached thereto as Exhibit "A," in and by which the Board instituted on its own motion a proceeding for the elimination of the grade crossing in question under Chapter 57 of the Laws of 1913. Hearings were had before said Board of Public Utility Commissioners on Dec. 16, 1926, Feb. 10th and March 17th, 1927, and on April 26, 1927, said Board issued its decision and order directing the elimination of the said crossing in accordance with the plan which required a separation of grades of the Railroad and the highway at the location of the present crossing and the carrying of the highway underneath the Railroad tracks by means of an underpass in accordance with the plan and profile referred to therein, a copy of which was attached thereto. A copy of which decision (exclusive of plan and profile) are attached hereto as Exhibit "B."

As Engineer of Grade Crossings of the Lehigh Valley Railroad Company I have made a study of the proposed elimination of the crossing at grade by the Railroad tracks of that Company of a road known as South Bridge Street, or State Highway Route No. 16 in the Township of Hillsborough, Somerset County, New Jersey, and also of a grade crossing by the tracks of that Railroad of another road located in said township and county known as the Camp Lane crossing.

The study of these two crossings involved a personal examination by me of the two crossings and the two highways in question, a survey of the crossings and highways; the survey of the State Highway Route No. 16 covering a distance of about 1200 feet on said highway east of the railroad tracks and about 1500 feet west thereof; the survey of the Camp Lane crossing covered a distance of several hundred feet on either side of the railorad crossing.

I also made estimates of the cost of eliminating the crossing of Highway Route No. 16, and Camp Lane.

I am informed that the Railroad at the crossing of Route No. 16 was originally constructed under the charter of the Easton and Amboy Railroad Company and the charter of the Bound Brook and Easton Railroad Company and that the Easton and Amboy Railroad Company was formed by special charter under the laws of the State of New Jersey known as Chapter 450 of the Laws of 1872, page 1017, and that the charter of the Bound Brook and Easton Railroad Company was formed by special charter known as Chapter 110, Laws of 1872, page 314, of the State of New Jersey.

I was present at all the hearings in this proceedings and presented on behalf of the Railroad Company Plan "C" as above described as an entirely feasible and practical plan for the elimination of said grade crossing. The only objection offered to said plan was that there were curvatures in the alignment of the highway. There was no engineering testimony offered on behalf of any of the parties to the hearing to the effect that the 6 degree curvature provided for in the alignment of the highway in Plan "C" was objectionable or dangerous. Plan "C" attached hereto as Exhibit "C."

Thomas J. Wasser, a Civil Engineer employed by and testifying for the County of Somerset at said hearing, testified that "a 6 degree curve is a safe curve," and again that a 6 degree curve "is perfectly safe," and again, "a 6 degree curve seems to be an accessible (acceptable) curve for all conditions."

The testimony of no engineer or expert witness was offered which unfavorably criticized the 6 degree curve contemplated on Plan "C."

On behalf of the Railroad Company testimony was offered by George C. Diehl, Consulting Engineer with wide

experience in highway construction for a period of thirty years, which showed that a 6 degree curve was not dangerous and does not decrease the facilities of travel on the highway. He testified that he had made a direct study of 356 crossings at grade in Erie County, New York, and a considerable number of crossings elsewhere in the State of New York, that he had directly supervised the building of 2000 miles of road in Erie County and eight to ten thousand miles of road outside of Erie County in the State of New York during the past 7 or 8 years, and that he had made an intensive study by actual experience to determine what degree of curvature would be dangerous or would curtail travel. As a result of these investigations and experiments, it was his belief that a 6 degree curve involved no increased danger or diminution of the capacity of the highway and that in highways in communities remote from cities curvatures up to 10 degrees have been adopted as standard.

Charles R. Vanneman, Chief Engineer of the Public Service Commission of the State of New York, also testified on behalf of the Railroad Company that for the past six years he had been Chief Engineer of the New York Commission in charge of all engineering matters pertaining to public utilities; In his opinion a 6 degree curve in a State highway was "perfectly safe." In the past six years he has supervised the elimination of 25 grade crossings where the curvatures have varied from 3 degrees up to 30 degrees and that curvatures were introduced in straight highways in order to reduce the skew angle of the bridges and the resulting construction costs.

Notwithstanding the fact that there was no testimony of any engineer or expert criticizing the 6 degree curve, and the testimony of a number of engineers and experts to the effect that a 6 degree curve was perfectly safe and entirely feasible, the Commission ordered the elimination of

the crossing on the line of the existing highway in accordance with the plan attached to the Commission's order. The only substantial objection offered to Plan "C" and the only substantial evidence urged or employed in support of the plan adopted by the Commission's order was based upon the desire for a straight highway without curvature.

Said Exhibit R. R. 1 shows that on the north side of the railroad track the depression of the highway begins at a point about 500 feet from the center of the railroad tracks. The most northerly 265 feet of this depression is on a curve and the deepest point of the depression on any part of the curve is five and one-half feet. Only 100 feet of this curve is in a depression of more than three feet and no part thereof is more than five and one-half feet below the surface of the surrounding ground. These depressions will not be between the walls of a cut. There will be sloped embankments on both sides, slope being at the rate of one and one-half feet horizontal to one foot vertical so that this embankment will recede from the edge of the roadway a distance of nine feet before it will rise to a height of six feet or to a height that will interfere at all with the visibility of a traveler on the highway in any form of vehicle. On the south side of the railroad the depression extends for a distance of about 400 feet, of which depression, about 240 feet from the northerly end of the depression is on a curve. The deepest depression on any part of the curve being seven feet, and only about 60 feet of the depression on the curve is higher than five feet or high enough in any way to affect the visibility of a driver of an automobile or the traveler in any other kind of a vehicle. The same slope of embankment will be provided on the north as has been described on the south side of the same recession of the embankment of nine feet from the edge of the roadway before its height will reach an eleva-

tion of six feet to interfere with visibility of highway travelers. The greater part of the curve on both sides of the railroad is outside of any depression and either above or on the same level as the surrounding country. With regard to the danger of accidents on curves, an analysis of the motor vehicle accidents of the State of New York for the year 1925 as published in the record of the National Conference on Street and Highway Safety held under the direction of Honorable Herbert Hoover, Secretary of Commerce, at Washington in March, 1926, shows that in the State of New York in the year 1925 there were 23,890 automobile accidents on straight, level road and only 1,316 such accidents on curves.

The estimated cost of Plan "C," as appears from the decision of the Commission, was $205,184.70. The cost of the plan adopted by the Commission's order, as estimated by the Chief Engineer of the Board of Public Utility Commissioners, was $324,400, representing a difference of approximately $120,000 in the cost of the Board's plan over the cost of Plan "C." For the purposes of necessity and convenience for the elimination of the grade crossing on Highway Route No. 16, Plan "C" was and is an entirely feasible and practicable plan and the advantages of a straight highway as provided in the Board's plan, while perhaps more desirable, added no practical or necessary advantage over Plan "C," although it will cost approximately $120,000 more than Plan "C."

The estimate of $205,184.70 included what the railroad company's engineers and real estate experts considered an adequate allowance for property to be acquired and damage to other property affected. This estimate for property to be taken and consequential damages was $1,000.00, which was deemed adequate, as the property consists of farm land in a rural community and no buildings or improvements were affected thereby. The cost of

the plan adopted by the Board as estimated by its chief engineer was $324,400.00. This represents a difference in the estimated costs of the two plans of approximately $120,000.00. The only item referred to by the Board in its decision as likely to decrease the difference in cost of the two plans was the item of property damage.

The order and plan of the Board are objectionable for the following reasons:

(1) They require the elimination of the crossing by a plan that is needlessly expensive and extravagant, and far beyond the requirements of public necessity and convenience at said point, and beyond the duty of the Railroad Company to furnish at its own expense.

(2) They require the construction of an underpass to the width of 66 feet, whereas at the place of said crossing the legal width of the highway is only 33 feet and the traveled width is not in excess of 20 feet.

(3) They require the construction of an underpass fully one-half of which is outside the limits of the legal width of the highway as it existed at the time the order was made.

(4) They require certain changes in the freight, passenger, and milk handling facilities of the Railroad Company at its Royce Valley Station, including the destruction of the existing and the creation of new and less convenient approaches thereto and there is no provision in the Statute authorizing the Board to change such facilities as a part of the proceedings for the elimination of the grade crossing.

(5) They direct the closing of a certain highway crossing located approximately 1220 feet east of the State Highway Route No. 16 crossing, and known as Camp Lane, and the construction of a connecting highway approximately 1940 feet long between Camp Lane and said High-

way Route No. 16 on the south side of the Railroad and at a distance from the center line of the Railroad varying from 225 feet to 420 feet. Said connecting highway is outside of the limits of the existing Highway Route No. 16 or of the existing limits of Camp Lane and said order is based upon no evidence before the Board showing jurisdictional facts upon which such order must be based. There was nothing in the evidence to show that the Camp Lane crossing was dangerous to the public safety or that public travel was impeded thereby. The testimony offered at the hearings of the Commission related solely to the crossing on Highway Route No. 16 and there were no admissions or statements of danger or impediment to travel at the Camp Lane crossing, and the elimination of the Camp Lane crossing is not necessary for or in any respect connected with the elimination of the crossing on Highway Route No. 16.

(6) They require, among other things, the construction of a bridge to carry the Railroad of sufficient length to permit the construction and maintenance of two sidewalks, one on either side of the highway. There is no evidence to show that the construction of two sidewalks is necessary and as a matter of fact, two sidewalks are unnecessary, since the crossing is located in a rural community and said Highway Route No. 16 has no sidewalk whatever in the vicinity of this crossing. At most, the public convenience would not require more than one sidewalk and the increased cost of providing the second sidewalk is unjustified by the evidence or by public necessity and convenience.

(8) They require a roadway 66 feet wide under the Railroad and the Camp Lane elimination. An order and plan limited to the elimination Highway Route No. 16 crossing at the present legal width thereof, namely, 33 feet, including one sidewalk, is estimated to cost $255,643.

Consequently, the order of the Board requires the railroad company to expend $68,757 in excess of the legal duties of the Railroad Company, or the powers of the Board even on the location of the present highway.

Said order specified that it should become effective May 10th, 1927, and directed the Railroad Company to begin the actual work required in the performance and execution of this order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of said order, and complete all of the work required thereunder to be done, within one year thereafter, or the first day of June, 1928.

WILLIAM R. JOHNSTON.

Sworn and subscribed before me
this 31st day of May, 1927.

MORTIMER EISNER,
An Attorney at Law of N. J.

Exhibit "B"—Board's decision, and Exhibit "C"—Plan "C," are included in Volume II (Exhibits) at pages 7 and 15, respectively.

Order to Show Cause.

Filed June 1, 1927.

It appears from the verified bill of complaint and the affidavits annexed thereto, verified May 31, 1927, duly filed on this 1st day of June, 1927, that the plaintiff is threatened with immediate and irreparable loss or damage if the defendants, or their successors in office, employees, agents or servants, or any of them, are allowed to compel the plaintiff to comply with the order of the Board of Public Utility Commissioners made and issued April 26, 1927, as therein required, or to impose upon the plaintiff, for failure to comply therewith, the penalties, fines, suits and prosecutions in said bill of complaint and affidavit set forth, and that there is not sufficient time for the usual notice to be given because the plaintiff needs immediate relief; and is therefore entitled to a temporary restraining order restraining the defendants as hereinafter set forth, on motion of Hobart & Minard, solicitors for plaintiff, it is on this first day of June, 1927,

Ordered that the defendants appear before the court at its courtroom, in the Post Office Building, in the City of Trenton, New Jersey, on the 10th day of June, 1927, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, then and there to show cause why the preliminary injunction prayed for should not issue.

And it appearing that there is danger of immediate and irreparable loss or damage to the plaintiff before the hearing of said application for the preliminary writ of injunction, unless the said defendants, pending such hearing are restrained as hereinafter set forth; now, therefore, it is

Ordered that the said defendants, the Board of Public Utility Commissioners, Joseph F. Autenreith, Frederick

W. Gnichtel and Charles Browne, as members of and constituting the Commission designated and known as the Board of Public Utility Commissioners; Edward L. Katzenbach, as Attorney General of the State of New Jersey, and Francis L. Bergen, Prosecutor of the Pleas of Somerset County, all of the State of New Jersey, and each of them and their successors, agents, servants and attorneys, and all persons acting by or under their authority, suggestion or direction, be and they are hereby specifically restrained and enjoined from instituting any action of debt in the name of the State of New Jersey or otherwise, to recover any penalties for the violation of said order or from instituting any proceedings by mandamus or injunction to compel specific performance of said order, or from instituting any proceedings for the prosecution of the defendant, its officers, agents, or employees, for failure or omission to do any act or thing required to be done by or under said order, or from compelling or coercing the plaintiff, its officers, agents or employees to begin the actual work of the elimination of said crossing in conformity with the requirements of said order, until the further order of this court; it is further

Ordered that a copy of this order, together with a copy of the bill of complaint and affidavits attached thereto (certified by the solicitors of plaintiff), be served upon the defendants, and each of them on or before the third day of June, 1927; and it is further

Ordered that at the time and place of the hearing of the application for preliminary injunction, the plaintiff have leave to present additional affidavits which shall be served upon the defendants at least one day prior to the date of hearing; and it is further

Ordered that the defendants, or any of them, have leave to read answering affidavits on the return day of this rule,

provided same are served upon the solicitors of the plaintiff at least twenty-four hours prior to the time of said return.

WM. N. RUNYON,
United States District Judge.

Supplemental Affidavits and Exhibits Submitted Pursuant to the Authority of the Order to Show Cause.

Filed June 10, 1927.

Affidavit of William R. Johnston.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

WILLIAM R. JOHNSTON, of full age, being duly sworn, deposes and says:

1. He is a graduate of Cornell University as a civil engineer; for about two years he has been, and still is, Engineer of Grade Crossings of the plaintiff; prior thereto for about eight years he was Terminal Engineer of the plaintiff; and has been engaged in railroad engineering, exclusively, for the past twenty-two years.

2. In addition to the two roadways each of 20 feet clear width, the plan adopted by the Board of Public Utility Commissioners requires space for a sidewalk on each side each having a clear width of 8 feet. There are no sidewalks elsewhere on Highway Route No. 16 in the vicinity of this crossing, which is located in a rural farming community in the Township of Hillsborough. The cost of said plan is materially increased by the provision for such sidewalk spaces. This highway is without sidewalks along the highway on either side of the bridge.

3. It is claimed that Highway Route is being widened to a uniform width of 66 feet. As a matter of feet, certain portions of the highway, not adjacent to the crossing in question, have been widened to sixty-six feet, but the new railroad bridge carrying the Central Railroad of New Jersey over this same highway at Somerville, a few miles distant from this crossing, which has recently been com-

pleted, provides a clear width of fifty-four feet over all, which is divided up as follows: Two sidewalk spaces each of seven feet clear width and a single roadway thirty-six feet wide, the balance of said space being occupied by columns to support the bridge. This bridge is in the very center of the populous Borough of Somerville and is one of a limited number of crossings of the Central Railroad by which local traffic is enabled to pass from one portion to another of the borough, which is divided by the railroad itself. While said road is being widened to the width of sixty-six feet in some places, that width is not the settled future width of the road at all places. As already stated, the new Central Railroad bridge in the Borough of Somerville provides a roadway only thirty-six feet wide, exclusive of sidewalks. Exhibit R. R. 15, offered at the hearing, shows that at Dukes Corners, where the Highway Commission has recently acquired additional lands for the widening of this highway and has completed the widening of the roadway, the entire highway is only fifty feet wide, of which only twenty feet is paved. This location is approximately a thousand feet away from the crossing in question, as appears by the testimony offered at the hearing.

4. The reason given by the Board for adopting its plan was to avoid 6 degree curves in the highway which were provided for in Plan "C." Between the Morris Township line and Labow's Corner, a distance of 27.38 miles, on the same highway, there are eighteen other locations where curves exceeding six degrees exist on the improved and permanent alignment of this highway. Plan "C" contemplates a bridge with a center pier, which divides the underpass into two roadways, so that the traffic in opposite directions will not come into conflict at this under-crossing. A schedule of these curves (Exhibit R. R. 10) is annexed hereto as Exhibit "D."

5. It is contended, in opposition to Plan "C" that the property damages alleged to have been omitted from the estimates of cost, resulting from the relocation of the highway when added to the cost of Plan "C," will substantially reduce the difference in cost between Plan "C" and the plan adopted by the Board. As a matter of fact, the estimate of $205,184.70 included what the railroad company's engineers and real estate experts considered an adequate allowance for property to be acquired and damage to other property affected. This estimate for property to be taken and consequential damages was $1,000.00, which was deemed adequate, as the property consists of farm land in a rural community and no buildings or improvements, other than on railroad property, are affected thereby. The cost of the plan adopted by the Board as estimated by its chief engineer is $324,400.00. This represents a difference in the estimated cost of the two plans of approximately $120,000.00. While it is contended that the railroad figures omit important items, which would go far toward equalizing matters, the only item referred to as likely to decrease the difference in cost of the two plans was the item of property damage.

6. Complaint is made of the delay in the elimination of this crossing. I find by reference to other minutes of the State Highway Commission that the matter of the elimination of this crossing was first considered by the Highway Commission on January 10, 1923. The matter was again considered from time to time by said Commission, and if there has been any delay in the consideration of the elimination of this crossing, it has been due solely to the failure of the State Highway Commission to execute the agreement referred to in my said original affidavit and to the attempt of certain residents and officials of the County of Somerset and the Township of Hillsborough and other adjoining townships to persuade said Highway Commis-

sion to refuse to execute said agreement and to adopt some other plan than that agreed to by the railroad and by the Highway Commission; if said agreement had been executed as authorized by the Highway Commission, the railroad company was prepared to proceed with the work immediately, and in the ordinary course of events the work would have been completed on or before January 1, 1926; whatever delay there has been in the elimination of the crossing is not in any way due to the attitude of the railroad company, which has always been ready to carry out the arrangement made with the Highway Commission in March, 1924, to eliminate the crossing in accordance with Plan "C" adopted by the Highway Commission prior to that date.

7. Plan "C" was adopted by the Highway Commission on March 11, 1924, and affirmed by it on April 20, 1924, by resolutions set forth at length on pages 4 and 5, respectively, in my affidavit attached to the bill of complaint. That action has never been rescinded or modified by the State Highway Commission, and it still stands on the records of its proceedings as its official action with respect to the plan for the elimination of this crossing, and with respect to the width and character which in the judgment of that Commission is necessary and suitable to the locality and the highway in question. A certified copy of the complete records and minutes of the proceedings of the State Highway Commission respecting this matter is attached hereto as Exhibit "E."

8. Plan "C" as originally proposed and adopted by the Highway Commission in March, 1924, provided for an undercrossing on Route 16 with an opening between abutments 40 feet wide, with a center pier 4 feet wide, leaving two driveways each having a clear width of 18 feet. The cost of carrying out that plan, including the construction of the relocated portion of Route 16; the cost

of property to be acquired for the relocation of the highway; and damages to other property affected by such taking or relocation, was estimated by the State Highway Engineer in March, 1924, at $109,024.00, of which the Highway Commission requested the plaintiff (and the plaintiff agreed) to pay $40,000.00. Later estimates, made by deponent, in February, 1927, showed that Plan "C," as finally revised and signed by the Highway Engineer and the Bridge Engineer of the State Highway Commission, and by the Chief Engineer and Bridge Engineer of the plaintiff, would cost, including cost of land to be taken and damages to property affected $145,024.47. A copy of that plan as so signed is annexed as Exhibit "F." Plan "C" could be modified so as to provide an underpass of the same width and facilties (including two sidewalks) as that shown on the plan adopted by the Board, for an additional expenditure of $52,500.00. In other words Plan "C" could be carried out with the same number and width of roadways and sidewalks, the same vertical and horizontal clearances and substantially the same grade of roadway approaches as called for by the Board's plan for $197,524.47 as compared with $307,950.00 estimated by Mr. Charles A. Mead, Chief Engineer of the Board, as the cost of the Board's plan for the Route 16 crossing.

9 In addition to the elimination of Route 16 crossing, the Board's plan calls for the closing of Camp Lane crossing, an unimportant, unfrequented country road located 1400 feet easterly of Route 16 crossing, and the construction of a connecting highway between Camp Lane and Route 16, on the south side and some distance away from the plaintiff's right of way. Deponent's estimate of doing this work according to his plan (Exhibits 2 and 3 combined) was $7,660.23, as compared with Mr. Mead's estimate of carrying out the Board's order with respect to Camp Lane, of $10,450.00. The estimates of both deponent

and Mr. Mead, as respects unit prices for material and labor, and are comparable except that they apply to Plan "C" and the Board's plan, respectively.

10. A copy of deponent's Camp Lane plan (Exhibits 2 and 3 combined) is annexed hereto as *Exhibit* "G."

11. A copy of the profile (Exhibit P-11) to the Board's Plan (Exhibit P-10) is annexed hereto as *Exhibit* "H."

12. A copy of deponent's estimate (Exhibit R. R. 8) of the cost of Plan "C" (as such plan was approved by the Highway Commission), as modified to provide an underpass of the same size and facilities as the Board's plan; and of Camp Lane connecting road, are annexed hereto as *Exhibit* "I."

13. A copy of Mr. Mead's estimate of the cost of the Board's plan (Exhibit P-10) and the Camp Lane connecting roadway is annexed hereto as *Exhibit* "J."

14. A copy of the order of November 24, 1926, by which the Board of Public Utility Commissioners instituted its proceeding is annexed hereto as *Exhibit* "K."

15. Order and plan adopted by the Board requires a roadway of 66 feet in width at the proposed underpass. A plan limited to the present legal width of Highway Route No. 16, namely, 33 feet, including one sidewalk, is estimated to cost $255,643, consequently the Board's order requires the plaintiff to expend $68,757 in excess of the legal duty of the plaintiff to provide an underpass for the legal width of the highway even at its present location and said order therefore exceeds the powers of the Board, in the respect that it requires an underpass in excess of the legal width of the highway.

WILLIAM R. JOHNSTON.

Sworn and subscribed this 2d day of June, 1927, before me

LOUIS D. GOLDBERG,
An Att'y at Law of N. J.

The exhibits referred to in the preceding affidavit are included in Volume II (Exhibits) as follows:

"Exhibit"	Page
"D"	14
"E"	16
"F"	31
"G"	37
"H"	38
"I"	39
"J"	42

Affidavit of George T. Hand.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

GEORGE T. HAND, of full age, being duly sworn, on his oath deposes and says:

(1) I am Chief Engineer of the Lehigh Valley Railroad Company and have full charge and supervision of all engineering and construction projects on the entire railroad.

(2) I am familiar with the crossing of State Highway Route No. 16 at Royce Valley and with Plan "C" as approved and agreed to by William G. Sloan, State Highway Engineer, for the State Highway Commission of New Jersey, and myself for the Lehigh Valley Railroad Com-

pany, and with the plan ordered by the Board of Public Utility Commissioners.

(3) I have been engaged in railroad and highway elimination engineering projects for the past 38 years, and am of the opinion that Plan "C" as approved and adopted by the State Highway Commission provides a safe, adequate and proper means of eliminating said crossing in a manner that fully meets the requirements of public safety and convenience, and without introducing any element of danger or impediment to highway traffic to the fullest capacity of the highway. While there are curves in the proposed depressed (relocated) highway called for by that plan there is less than 60 feet of such curved depression where the side slopes will be higher than 5½ feet and during this distance the slope of the embankment is sufficient to afford highway travellers an unobstructed view along the highway to avoid danger, and this space is at least 310 feet from the center line of the proposed bridge, and of this 310 feet 245 feet are on entirely straight highway.

(4) In my opinion the plan ordered by the Board requires unnecessary width of highways and unnecessary sidewalk spaces and contains no elements of safety whatever, and no elements of convenience, which justify the expenditure of the difference between $324,400.00 as estimated by the Chief Engineer of the Board as the cost of its plan, and $145,024.47, as estimated by the plaintiff's engineers as the cost of Plan "C," as approved and adopted by the State Highway Commission. The Board's plan is a wasteful extravagance of the plaintiff's earnings, which should be conserved for use in furnishing safe, adequate and proper transportation facilities and for improvements necessary, within the limits of reasonable economy, for public safety and convenience. If the Board's

plan is carried out it will involve a reckless and useless waste of from $120,000.00 to $170,000.00 of money which will benefit nobody, and, to that extent, will prevent the plaintiff from providing safe, adequate and proper service and making reasonable expenditures for necessary public improvements. The plan ordered by the Board is one which I could not recommend to or justify before the Directors or Stockholders of the plaintiff as a reasonable or necessary project, because of the unnecessary and excessive expense involved therein.

(5) The necessity for economy in each and every grade crossing elimination project, regardless of its individual cost, is shown by the following schedule of Grade Crossings on the plaintiff's railroad, classified as to importance, and the estimated cost of eliminating said crossings by reasonable and economical means and plans:

SCHEDULE OF GRADE CROSSINGS
on Lehigh Valley Railroad

State	Number of Class					Estimated cost to eliminate			
	A	B	C	Sidings	Total	A	B	C	Total (exclusive of sidings)
(a) New York	116	211	301	34	662	$14,598,000	$14,436,000	$15,692,000	$44,726,000
(b) New Jersey	10	25	69	13	117	2,322,770	1,636,175	3,635,472	7,594,417
(c) Pennsylvania	24	70	396	28	518	5,574,648	11,040,470	38,856,312	55,471,430
Total	150	306	766	75	1297	22,495,418	27,112,645	58,183,784	107,791,847

Note: (a) Classification and estimates made by New York Public Service Commission.
(b) } Classified according to formula prescribed by New Jersey Board of Public Utility Commissioners; cost of elim-
(c) } ination determined by applying New York Commission's average cost per crossing in each class.

GEO. T. HAND.

Sworn and subscribed before me
this 3rd day of June, 1927.

JOHN J. O'DONNELL,
Notary Public of N. J.
My Commission expires 5-13-32.
(Seal)

Affidavit of C. E. Hildum.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

C. E. HILDUM, being duly sworn, on his oath deposes and says:

(1) I am Vice-President and Comptroller of the Lehigh Valley Railroad Company and as such am in charge of all the accounts of the Railroad Company, both as to revenue and disbursements, and with the reports made to the various State and Interstate Commerce Commissions for the plaintiff. I am familiar with the records of Property investment, Total operating revenues, Adjusted total operating expenses, Railway Tax Accruals, Uncollectible railway revenue, Hire of equipment and joint facility net rentals, and the adjusted net railway operating income, both as to amount and rate of return.

I am familiar with the provisions of Section 15A of the Act to Regulate Commerce as enacted by Section 422 of the Transportation Act, 1920, which directs the Interstate Commerce Commission to initiate, modify, establish and adjust such rates so that the carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment earn an aggregate annual net operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railroad property of such carriers held for and used in the services of transportation. It also required the Interstate Commerce Commission to determine and make public what percentage of such aggregate property value constitutes a fair return, and that "in making such determination it shall give due consideration, among other things, to the transportation needs of the

country and the necessity (under honest, efficient and economical management of the existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

In and by said Act it was provided that for two years beginning March 1, 1920, such fair return should be a sum equal to 5½% of such aggregate value and in the discretion of the Commission an additional sum of one-half of one per cent. of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which according to the system of accounting prescribed by the Commission are chargeable to capital account.

(2) Pursuant to the provisions of this Act the Interstate Commerce Commission initiated a proceeding for the classification of carriers in such rate groups or territories as the Commission saw fit and by its order made therein ascertained the aggregate value of the railroad property of the carriers held for and used in the service of transportation, and fixed and established as a fair return thereon 5½% plus an additional one-half of one per cent. for improvements, betterments or equipment, and the Commission also ordered certain percentages of increase in the freight rates of the several rate groups, to wit, 40% increase for the Eastern group, in which the Lehigh Valley Railroad Company is located, which was considered and determined by the Commission as sufficient to yield such reasonable return to the carriers embraced in that group, including the Lehigh Valley Railroad Company. The above mentioned proceedings of the Interstate Commerce Commission is known as "Ex Parte 74," was decided July 29, 1920, and is reported at 58 I. C. C. 220.

(3) Since said decision of July 29, 1920, the Interstate Commerce Commission on March 1, 1922, altered the

amount of the rate of fair return from 6% to 5¾% by decision reported 68 I. C. C. 676, and has made subsequent minor adjustments in rates in an effort to preserve and maintain said fair return (58 I. C. C. 302, 68 I. C. C. 676).

Following is a table showing the rate of return on property investment received by the Lehigh Valley Railroad Company for the calendar years 1923, 1924, 1925 and 1926, which is a true statement of the records of my office. The last column in the following tabulation shows the actual rate of return received by the Lehigh Valley Railroad Company upon its property investment from 1923 to 1926, both inclusive:

RATE OF RETURN ON PROPERTY INVESTMENT

LEHIGH VALLEY RAILROAD CO.

Calendar year ended:	Property Investment Dec. 31st	Total Operating Revenues	Total Operating Expenses	Railway Tax Accruals	Uncollectible Railway Revenue	Hire of Equipment & jt. facility net rentals	Net Railway operating income	
							Amount	Rate of Return
Dec. 31, 1925	258,468,372	76,430,573	57,433,390	$2,323,308	$3,935	Dr. $280,576	$6,573,121	2.62%
Dec. 31, 1926	258,468,372	80,453,150	60,958,636	3,201,422	15,664	Dr. 798,202	11,391,549	4.42
Dec. 31, 1923	$250,989,203	$75,935,154	$66,754,214	3,604,182	17,400	Dr. 880,621	12,494,980	4.83
Dec. 31, 1924	257,505,658	76,374,806	60,967,968	4,193,976	11,800	Dr. 1,486,133	13,802,605	5.34

C. E. HILDUM.

Sworn and subscribed before me
this 3rd day of June, 1927.

POLLARD A. HOAG,
Notary Public,
Kings Co.
My Commission expires March 30, 1928.

Affidavit of Charles R. Vanneman.

CHARLES R. VANNEMAN, of full age, being duly sworn, on his oath deposes and says:

1. He resides in the City of Albany, State of New York, and is a Civil Engineer by profession, having graduated from Cornell University as such engineer. For five and one-half years he was employed as Civil Engineer by the Pennsylvania Railroad in the maintenance, operating and construction departments; for the past seventeen years he has been associated as an engineer with the Public Service Commission of the State of New York as Chief Engineer for the Division of Transportation, Chief of the Division of Steam Railroads, Engineer of Grade Crossings, successively, and for the past six years of that period as Chief Engineer in charge of all engineering matters pertaining to public utilities subject to the jurisdiction of the Public Service Commission for the State of New York. All grade crossing elimination work in the State of New York over which the Public Service Commission has control comes entirely under his jurisdiction from the inception of the project through the hearings (many of which he personally conducts) and upon the completion of the hearings he recommends to the Commission for adoption an order determining how each elimination shall be made.

2. The policy of the Public Service Commission of the State of New York with respect to the elimination of grade crossings is to adopt plans which will eliminate the crossings safely and as economically as possible. The matter of economy is an important factor in grade crossing elimination work.

3. The Public Service Commission has adopted no standard of curvature limits, but in his opinion a 6-degree

curve on an important state highway is perfectly safe. In the past six years he had charge of the elimination of something over twenty-five grade crossings, which involved curvatures with a radius varying from 190 feet up to 1500 feet. A 6-degree curve has a radius of 955 feet and a fraction.

4. He testified as a witness for the railroad company in the hearing before the Board of Public Utility Commissioners involving the crossing in question in this case on February 10, 1927, and is entirely familiar with Plan "C," which was introduced in said hearing as Exhibit R. R. 1. He is familiar with several instances in which he has supervised and approved plans for grade crossing elimination on state highways in New York State similar to Plan "D," where similar curves have been introduced and used for the sake of economy. The reason for using such curves is that it reduces the skew angle of the bridge, thereby shortening the length of the span, and makes a material reduction in the cost of the improvement. The physicial conditions existing with respect to highway and railroad at Royce Valley crossing, which is the crossing in question in this case, and the grade crossing of Broadway just outside of the City of Buffalo in the village or town of Chekowaga, are similar. That was one of the most important highways in the State of New York and was an east and west trunk line highway. In that case the New York Public Service Commission on his recommendation approved a plan which diverted the highway and changed the skew angle of 20 degrees to an angle of approximately 45 degrees by introducing reverse curves having a radii of 1000 (6-degree) with the sketch of tangent under the crossing. That plan resulted in a very great deal of saving of expense. He considers that it is necessary and advisable in grade crossing eliminations to consider the question of economy and construction

where the resulting conditions will not be dangerous or detrimental to the public, and that practice is followed by him and by the New York Public Service Commission.

5. Plan "C" provides a tangent under the bridge of nearly 500 feet in length, and in his opinion Plan "C" is entirely feasible and practicable and safe and would not result in any way in the lessening of the capacity of the highway to carry traffic or in any condition of danger to such travel provided the center columns are adequately marked to make them conspicuous under foggy weather conditions. The practice in New York State is to have columns either painted black and white with a checkered board effect or crossed with diagonal black and white lines six or eight inches wide, and to illuminate them either with a red light or a white light overhead reflected upon the painted face of the columns. This marking or illumination would apply equally to the columns provided for in the plan adopted by the Board of Public Utility Commissioners. He considered the center columns desirable particularly in a case of this kind for the purpose of dividing the line of travel on the highway. Where undercrossings have a space of 40 feet between the curbs there is a natural tendency for vehicular travellers to pull away from the curb towards the center, and in many instances he has observed a virtual cutting down, by this means, of a four-line traffic highway to a two-line traffic highway. In cases of a two-way highway, such as contemplated by Plan "C," such a condition would not prevail. Two lines of traffic could pass simultaneously under either side of the bridge.

6. His observance in New York State is that a major portion of the roadway accidents occurring because of collisions of one vehicle with another occurs on tangents. An analysis of the motor vehicle accidents of the State of New York for the year 1925 shows that during that year

in that State there were 23,890 automobile accidents on straight level roads and only 1,316 such accidents on curves, and a considerable portion of the State highway system in New York is among the hilly and mountainous section of the State, where a great deal of curvature exists. In his opinion this is an entirely logical result, because it is on the tangents that the highest rate of speed is maintained and it is also on tangents where following vehicles endeavor to cut out from behind and pass preceding vehicles. On curves there is a tendency to maintain moderate speed, and he observes from his experience that curves preceding a structure such as proposed in Plan "C," where the view through the structure is ample as would be the case in a structure of this design, with a tangent of approximately 500 feet, speed is reduced and thereby the element of danger is greatly reduced. Within certain limits travel on a curve is safer than traveling on a straight highway, provided the curve is not too sharp. But a curve with a radius of 1000 feet is so slight that the highway traveler does not know he is on a curve provided there is a slight super-elevation on the outside of the curve. With an ordinary super-elevation there is no tendency of the vehicle to slide down toward the center any more than there would be on the crown of a perfectly straight highway. On a curve with 1000 feet radius there would be no danger of skidding unless a traveler tried to operate at 60 miles an hour on an icy road. In a fog a 6-degree curve would be no more dangerous than a straight road, and such a curve would be no more dangerous than a straight road for driving at night. From his experience, both as an engineer, designing and constructing highways, and as the operator of an automobile, he does not think it would be more dangerous to travel on a 6-degree curve in a fog or at night than on a straight road.

7. During the month of January, 1927, he visited the crossing in question and made an examination of the situation for the purpose of considering Plan "C" and for the purpose of giving his testimony with respect to conditions of safety and convenience of travel on the highway as proposed by Plan "C," and is entirely familiar with the situation, both on the ground at the present crossing and with respect to the proposed relocation and under crossing contemplated by Plan "C." During the past six years he has supervised the elimination of approximately 25 crossings under conditions similar or almost exactly similar to the crossing in question, and in order to reduce the cost of elimination in some instances at such crossings existing curves have been increased and in other instances, where straight highways existed, curves have been introduced for the same purpose, under construction plans similar to Plan "C." In addition to the crossing at Broadway, above referred to, he had another one just outside of Rochester on a main east and west highway almost identically the same situation as existed at the crossing in question, but where the skew angle was even greater—about 30-degree—and another on the Delaware and Hudson Railroad, near Afton, New York, where the skew angle was not more than 20-degree. At both of these crossings the highway was perfectly straight and the highway was relocated by the introduction of curves for the purpose of reducing the cost of the elimination. These two eliminations occurred in 1926. In 1925 he supervised the elimination of a crossing near Watertown, where curves were also introduced in a straight highway for the purpose of taking advantage of a fill on which the railroad was located for the purpose of constructing an under-crossing. He does not recommend center piers for a highway under-crossing unless there is a tangent in advance of those piers for approximately 200 feet and where the

radii of curvatures is above 500 feet (the radius of 500 feet produces a curve twice as sharp as a radius of 1000 feet). He has not recommended many crossings in New York State with center columns, because they have not ordered many where the clear span between the abutments was more than 32 feet. The contour of the country where the changes were made near Watertown, Afton, Rochester and Broadway, above referred to, was like that at the crossing in question. In some of those cases the country was slightly more rolling than the crossing in question and in others more flat. Crossings of this character he can usually eliminate for $125,000. The reason why he is careful to consider economy in improvements of this kind is that he would hate to spend money recklessly for such a purpose. In the State of New York the statute divides the expenses 50% with the railroad company and 50% with the State and Municipalities, so that questions of economy are important to the public as well as to the railroad companies. Curves are introduced primarily not because of the topography of the country, but because it is a question of keeping the cost down as low as possible, consistent with safety. At Royce Valley the country is only slightly rolling and he would consider it advisable to introduce curves of even 6-degree in a highway that is now straight to eliminate this crossing for the purpose of saving expenses. He would not introduce a curve if something could not be accomplished thereby or if a dangerous condition would result. He always eliminates crossings on a tangent if the expense is equal or substantially equal to that of any other method. At the crossing at Broadway, near Buffalo, which will be constructed this summer, the clear width between curbs is to be 40 feet for four lines of traffic. The one at Afton will be approximately 30 or 32 feet. Practically all of the eliminations in New York State have provided a clear roadway of 30 to 32 feet under

the bridge. Under the practice in New York State under his direction he would introduce curves to eliminate crossing on a straight highway if he could save twenty or thirty thousand dollars thereby working on the principle that every dollar he can save in that way can be applied toward the elimination of some other grade crossing.

CHARLES R. VANNEMAN.

Sworn and subscribed this 3 day of June, 1927, before me, a Notary Public, duly commissioned and sworn as witness my hand and official seal.

LELIA WELLINGTON,
Notary Public,
New York County.
New York County Clerk's No. 116.
New York Register's No. 8159.
Commission expires March 30, 1928.
(SEAL)

Affidavit of Walter Steele.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

WALTER STEELE, of full age, being duly sworn, on his oath deposes and says:

1. I am employed by the Lehigh Valley Railroad Company as Assistant Section Foreman.

2. On June 3rd, 4th and 5th, 1927, between the hours of 7 in the forenoon and 8 in the afternoon I took a traffic record of all classes of highway traffic across the Lehigh Valley Railroad tracks on Camp Lane, in the Township of Hillsborough, County of Somerset, State of New Jersey, and a complete tabulation thereof is as follows:

June 3	Autos	Trucks	Pedestrians	Bicycles & Motorcycles	Wagons	Total
A. M.						
7 to 8	2	9	3	1	0	15
8 " 9	7	3	4	0	0	14
9 " 10	1	4	2	0	2	9
10 " 11	4	3	1	1	0	9
11 " 12	6	2	5	0	3	16
P. M.						
12 to 1	2	5	1	0	0	8
1 " 2	1	3	1	0	1	6
2 " 3	5	1	0	0	0	6
3 " 4	9	1	14	1	0	25
4 " 5	4	0	0	0	0	4
5 " 6	11	4	0	5	2	22
6 " 7	7	2	0	1	0	10
7 " 8	9	3	7	3	1	23
						167

June 4	Autos	Trucks	Pedestrians	Bicycles & Motorcycles	Wagons	Total
A. M.						
7 to 8	4	6	1	3	0	14
8 " 9	3	3	3	0	0	9
9 " 10	1	2	1	2	2	8
10 " 11	3	1	1	2	0	7
11 " 12	4	1	4	4	1	14
P. M.						
12 to 1	6	5	1	1	0	13
1 " 2	5	8	1	0	0	14
2 " 3	7	4	4	1	0	16
3 " 4	6	3	0	1	0	10
4 " 5	4	1	0	0	0	5
5 " 6	11	2	0	2	0	15
6 " 7	10	0	0	0	0	10
7 " 8	4	1	0	0	0	5
						140

June 5	Autos	Trucks	Pedestrians	Bicycles & Motorcycles	Wagons	Total
A. M.						
7 to 8	3	0	2	0	0	5
8 " 9	0	1	0	0	0	1
9 " 10	4	3	0	0	2	9
10 " 11	2	4	0	2	0	8
11 " 12	0	1	9	0	0	10
P. M.						
12 to 1	4	1	2	0	1	8
1 " 2	6	1	6	3	1	16
2 " 3	7	0	10	4	0	21
3 " 4	5	0	4	0	1	13
4 " 5	11	1	5	3	0	20
5 " 6	6	1	2	1	0	10
6 " 7	10	0	10	2	0	22
7 " 8	9	0	3	1	0	13
						156

WALTER STEELE.

Sworn and subscribed before me this 6th day of June, 1927.

LOUIS W. EINSON,
A Notary Public.

(Seal)

Affidavit of George C. Diehl.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss.:

GEORGE C. DIEHL, of full age, being duly sworn, on his oath deposes and says:

1. That he resides in the City of Buffalo, New York, where he is engaged in the practice of the profession of civil engineering and specializes in highway engineering. For thirty-two years he has been connected with the State Highway Department of the State of New York, ever since the passage of the first highway bills, during part of which time he has been its Consulting Engineer.

2. For the past twenty-nine years he has been County Engineer of Erie County, New York, which is the largest county in that State, and makes the largest expenditures of any county for highways.

3. In the thirty years during which he has been practicing his profession he has been Consulting Engineer for more than 50 different municipalities and for 12 years of that period he was at the head of the National Road Improvement Committee of the American Automobile Association, and as such made a study of highway conditions in each State of the United States.

4. Since the advent of the automobile he has had a great deal to do with the improvement of highways and the elimination of grade crossings.

5. He made a thorough study of 356 railroad crossings at grade in Erie County, New York, and a considerable number of grade crossings in other parts of that State. He has directly supervised the building of 2,000 miles of road in Erie County, New York, and between 8,000 and 10,000 miles of road elsewhere in that State.

6. He has examined the plan designated as Plan "C," which was introduced as Exhibit RR-1 before the Board of Public Utility Commissioners at its hearings regarding the crossings in question, and has in mind the general scheme of the elimination by means of the relocation or diversion of Highway Route No. 16 as therein provided.

7. He has personally inspected the crossing in question and made a study of the situation of the railroad, the highway and the general condition of both, and of the ground in that locality. He was present at the hearing before the Board of Public Utility Commissioners held in this matter on March 17, 1927, and testified as an engineering witness on behalf of the railroad company. The only substantial objection to Plan "C" before said Board was directed to the proposed curvature of the highway as relocated on said plan and to the supposed dangerous conditions created by such curves. In his experience and opinion as a civil engineer and highway engineer curvatures of six degrees, such as proposed on said Plan "C," are not dangerous and do not decrease the facilities for traveling.

8. During the past 7 or 8 years he has made an intensive study, through actual tests and experiments, to determine what degree of curvature would be dangerous or would curtail and impede traffic. As a result of these tests he has reached the conclusion that in the vicinity of centers of large populations on highways of two lanes and upward (that is, two or more lanes of traffic) the de-

gree of curvature with a 1,000-foot radius, which is equivalent to a six-degree curve, is the limit of curvature beyond which there is no increased danger or diminution of capacity on the highway. That is to say, that up to and including six degrees of curvature there is no increased danger or diminution of capacity. In highways remote from cities affording two lanes of highway travel the accepted standard which he has adopted, after these tests and experiments, has been a 600-foot radius, which is equivalent to a 10-degree curvature. As a result of these tests and experiments, which have been conductd by him personally and by men in his employ and acting under his supervision, he has found that a six-degree curvature does not create any substantial difference in point of danger and capacity of highway from a straight road.

9. In driving upon a highway that is perfectly straight vehicles frequently describe arcs equivalent to a six-degree curvature. An automobile does not follow a straight line like a railroad train on a straight track, but passes along a straight highway not in a perfectly straight line, but in a series of bends and curves, being at one time on one side of the line of traffic and another time on the other side, turning out to pass vehicles and other objects in the road. It is not unusual for vehicles moving on a straight highway to be operated on arcs having a radius of 1,000 feet.

10. The basis of all improvements in transportation facilities, whether it be by steam, water, air or highway lines, is the question of economy of construction and maintenance, which is always taken into account in designing and carrying out such improvements. The question of the justification of such an expenditure depends largely on the cost per mile and in practically every instance where he has constructed a highway, whether it has involved the elimination of grade crossings or not, careful considera-

tion has been given to the amount of travel and the justification for the expenditure. In the construction of highways and in the elimination of grade crossings the slogan has been generally adopted that highway dollars must pay their way and they should not be squandered in the construction of roads or in building for highway travel by unreasonable or unnecessarily expensive plans or designs any more than for any other means of transportation.

11. In the country or rural district of New York State ten-degree curves have been generally adopted as a standard of safety and convenience, and this degree of curvature has been used by the New York State Highway Department and all other municipal or political subdivisions of that State which have control of highway funds.

12. A highway known as Broadway in the vicinity of the City of Buffalo, with which he is familiar and which he laid out, prepared the plans for and supervised the construction of, is one of the most important highways in the State of New York (known as State Road No. 7) and is one of two main state highways crossing the central part of the State from Buffalo to Albany. The other of such main thoroughfares is known as Main Street and leads out of the City of Buffalo. Some time ago an application was made to the New York Public Service Commission by the Board of Supervisors of the County having control of Broadway, and whom he represented, for the separation of grades of a grade crossing of that highway over the Erie, D. L. & W. and Lehigh Valley Railroad. At this point Broadway crossed these railroads at an angle of about 25 degrees, which presented an unsafe condition. The highway was practically straight at these crossings and studies were made with a view to keeping the highway straight as far as consistent with changing the intersecting angle of the highway and the railroads to 45 degrees. After the most careful consideration and study by the various

municipalities involved they adopted a 1,000-foot radius (6-degree curve), with a view of crossing the railroad at an angle of 45 degrees and thereby greatly reducing the cost—almost cutting the cost in half—of the improvement, and in his opinion, and in those of his associates who represented the public, the introduction of this six-degree curve caused no additional danger or any diminution of the capacity of the highway. That highway involved four 10-foot traffic lanes.

13. As the introduction of a 1,000-foot curve (6-degree) at the Royce Valley grade crossing, now in question, will result, as appears from the estimates on Plan "C" and the plan adopted by the Board of Public Utility Commissioners, in a saving of one hundred or one hundred twenty thousand dollars on the project, he is of the decided opinion that such a curvature should be adopted and that the dangers or inconvenience to public travel will be entirely immaterial and insubstantial and that such curvature should be considered and adopted, and this conclusion is not affected or altered by the fact that a part of this relocated roadway under Plan "C" will be depressed or that some part of such depressed highway will contain a curve, or that there will be a bridge to carry the railroad across such depressed highway. He is of the opinion that the adoption of Plan "C" will create practically no more danger or inconvenience to public travel than would a perfectly straight road, as contemplated by the plan of the Board of Public Utility Commissioners. The presence of the piers in the middle of the highway, as contemplated by Plan "C," as compared with the center pier, contemplated by the plan adopted by the Board of Public Utility Commissioners, will not increase the danger or inconvenience to highway travel. In the innumerable tests which he has made he found that an automobile can be driven with the same degree of safety on a curve of 1,000-

foot radius (6 degrees) as on a straight highway. In neither of the plans above mentioned is the center pier on the curved section of the road, but is in the straight section of the road. On the south side of the railroad Plan "C" provides for a straight highway for a distance of 130 feet southerly from the center line of the railroad and on the north side Plan "C" provides for a straight highway for a distance of 245 feet north of the center of the railroad tracks. That plan also provides on the north side of the railroad for a depression beginning at a point about 500 feet north of the center of the railroad. The first 265 feet of this depression (beginning at the point 500 feet north of the railroad and proceeding southerly) is on a curve and the deepest point of the depression on any part of the curve is five and one-half feet. Only 100 feet of this 265 feet of curve is in a depression of more than three feet and no part of this curve is in a depression of more than five and one-half feet below the surface of the surrounding ground, and no part of this curve comes nearer to the proposed railroad bridge than 245 feet. On the south side of the railroad the highway is to be depressed, according to Plan "C," for a distance of 400 feet, 240 feet of which (the most southerly 240 feet of the depression) is on a curve, but no part of this curve is nearer to the railroad bridge than 130 feet. The deepest depression on any part of this curved section is seven feet, and only 60 feet of such curved depression is deeper than five feet.

14. According to Plan "C" the sides of the depression on both sides of the railroad have embankments sloping at the rate of one and one-half feet horizontal to one foot vertical, and will, therefore, recede from the sides of the roadway a distance of nine feet for each six feet of elevation. At no point in the curved depression on the north side of the railroad will the embankment be high enough

or near enough to the roadway to affect or impair the vision along the highway of persons travelling in any class of highway vehicle, and on the south side of the railroad the sloping embankments of the curved depression are high enough to affect or impair the vision along the highway of persons travelling in any class of vehicle for a distance of less than 60 feet, no part of which is within 310 feet of the center of the proposed railroad bridge. In other words, there is no point in the north side of the railroad where the curved depression will interfere in any wise with the view of the highway travellers and on the south side of the railroad the highway travellers will have a clear and unobstructed view of the highway after passing the 60 feet of curved depression that might affect their view for 310 feet before reaching the center of the bridge. The greater part of the relocated highway which is on a curve is outside of any depression and is on the level or above the level of the surrounding country.

15. According to Plan "C" the pier is on a straight section of the road and the curve ends on the south side of the railroad at a point 130 feet away from the bridge and on the north side of the railroad at a point 245 feet away from the bridge, and, in his opinion, the center pier would be no more dangerous under Plan "C" than under the plan adopted by the Board of Public Utility Commissioners in so far as curves in the highway are concerned and their possible obstructions to view. A curve gives a better view of the road than if it were perfectly straight. In some respects the view on a slight curve is better than on a straight course, particularly if there happens to be a large truck ahead of the driver. If a person is driving an automobile on a curve of a radius of 1,000 feet (6 degrees), as he sits behind the driver's wheel and looks ahead for vehicles on the road, whether travelling in the same direction or in the opposite direction of such vehicles, if a

large vehicle is in front of him it obstructs his view to a greater extent on a straight road than on a curved road, where he gets a better view of vehicles approaching from the opposite direction than he would if he were on a straight road. This opinion is based entirely on vehicles being ahead. If there are no vehicles ahead the driver gets an unobstructed view whether he is on a straight road or on a curve. A driver of an automobile is more interested in objects 200 or 300 feet ahead of him than he is with objects 1,000 feet ahead of him. It is perfectly safe to drive an automobile on a curve with a 1,000-foot radius (6 degrees) at the same rate of speed that it is on a straight road, regardless of the weather conditions—whether it is raining or snowing.

16. In the elimination of the grade crossing on Broadway near Buffalo, above referred to, they introduced two 1,000-foot curves, in opposite directions, and the plan adopted for the elimination of these crossings was substantially the same as Plan "C" proposed for the crossing in question. The curves were introduced in that case for good and sufficient reasons, namely, reasons of economy, and that economy was accomplished by such curves without increasing the danger or inconvenience to highway travellers on a four-lane highway under heavy traffic conditions.

17. The State Highway Commissions of New York and New Jersey are both constantly eliminating curves in highways, but they are not spending money to eliminate 6-degree curves. The curves which are being so eliminated are sharper curves than 6 degrees and those which introduce danger or diminish the capacity of the roads. He is now engaged in a project for the elimination of at least 100 curves in the highways of the State of New York, but they are all curves sharper than 6 degrees, and at the same time he is engaged in projects for the introduction of

6-degree curves. There are certain degrees of curvature which produce the same conditions of safety and convenience as a straight road for speeds up to 40 and 45 miles an hour. He has endeavored to ascertain at what point curvatures will affect safety or convenience at such speeds, but these are not affected by curves of a 1,000-foot radius. At a speed of 40 or 45 miles an hour an automobile can be brought to a stop in a distance of approximately 200 feet or less, and if curved sections of highways contain no obstructions to view within such a distance it is unnecessary and uneconomical to reduce such curves.

18. He examined the highway and the crossing at Royce Valley during the month of March after a heavy snow, and he is familiar with snow and ice conditions on highways, since it is his duty to keep 500 miles of road clear from snow in the vicinity of Buffalo, where considerably more snow falls each winter than in the vicinity of Royce Valley, and it is his opinion the Plan "C" would not present any danger or inconvenience to public travel under snow or ice conditions. The fact that snow and ice decreases the capacity of a highway does not alter or affect the relative conditions between a straight road and a road with a 6-degree curve. One of the reasons is that under such conditions a lower rate of speed has to be maintained by highway vehicles whether they are on a straight road or on a curve. From any point on the relocated highway as proposed in Plan "C" a highway traveler in each direction would have an unobstructed view of at least 250 feet. Generally speaking, it is desirable to have a tangent of 500 feet, that is, 250 feet on each side of such an under-crossing, that is an ideal condition, but he approves plans where there is a 100-foot or 150-foot tangent on each side because a tangent of 250 feet would not be of sufficient advantage or benefit to warrant any large expenditure.

In the design of any line of transportation the curves and straight lines are used. There are a number of important reasons which require the use of curved ways, amongst them:

(1st) The matter of securing a satisfactory grade; for instance, a high hill might require an entirely unwarranted expense, whereas a proper degree of curve to circle about the hill would make the trafficway a more economically sound proposition.

(2nd) There are certain given points or termini which a trafficway is designed to serve. These do not always lie along a straight line, and therefore curves must be used to effect the necessary change in direction to serve the various points desired.

(3rd) In the crossing of a stream, particularly if it be of substantial width, it is generally desirable for economic reasons to cross this stream at right angles, or nearly so, and, therefore, curves are required in the road alignment.

(4th) In the crossing of railroad tracks sharp, acute angles cause unnecessary expense with the consequent high rates of transportation charges, and, therefore, it is desirable to cross railroads as nearly at right angles as possible, seldom, if ever, at angles less than 45 degrees.

(5th) In adapting main thoroughfares to city planning, both as it relates to existing streets and proposed highways, it is frequently found necessary to introduce curves in highways in order to facilitate future development and avoid large expense which bad intersections with existing or proposed highways would cause. Practically no transportation line, whether it be a steam railroad, a waterway, and airway or a public highway, can be laid in an absolutely straight line, and the introduction of curved highways of proper radius and of differences of elevation at proper grades is not only not objectionable, but is ex-

tremely desirable and necessary, and should always be resorted to when required to construct the trafficway in an efficient and economical manner to best serve the purposes intended.

There must always be limitations in the rate of grades and degree of curvature. Referring particularly to the degree of curvature on main thoroughfares, a 600-foot curve should not be exceeded in outlying districts nor should the 1,000-foot grade be exceeded in urban localities on busy thoroughfares. In outlying sections a 600-foot radius (10-degree curve) should be the minimum and on busy urban streets the 1,000-foot radius (6-degree curve) should be the minimum. In the latter event a 1,000-foot radius assures every convenience which, as far as rates of speed, safety and capacity of highways are concerned, should be obtained from a straight track or way.

No 20

In order to illustrate the degree of flatness of a 1,000-foot curve the statement should be made that the deviation from a straight line of a 1,000-foot radius curve in a distance of 10 feet is $\frac{5}{8}$ths of an inch.

To illustrate this graphically, the following illustration may be used:

Suppose a common copper penny were placed upon the pavement 10 feet in front of an automobile so that the right edge of this penny were absolutely in a straight line with the right front wheel of the automobile. Then suppose that in travelling the 10 feet at a radius with a 1,000-foot curve then the wheel would pass over the left-hand edge of the penny instead of the right-hand edge.

This illustrates the insignificance of a 6-degree curve and also illustrates that even the most careful driver, using extreme caution and accuracy, cannot travel in an abso-

lutely straight line, but will describe arcs of at least 1,000-foot radius.

GEORGE C. DIEHL.

Sworn and subscribed this 7th day of June, 1927, before me, a Notary Public of New York, Erie County, duly commissioned and sworn as witness my hand and official seal.

BURTON F. GIBBY,
Notary Public.
My Commission expires March 30, 1929.
(Seal)

Depositions (on Behalf of Defendants).

Filed June 10, 1927.

CHARLES F. BEDWELL, being duly sworn according to law, on his oath says:

I am Construction Engineer of the New Jersey State Highway Commission in charge of construction and right of way. I am acquainted with State Highway Route No. 16 and the action of the Highway Department in connection therewith.

This route was taken over as a State highway in 1920. At that time, in the neighborhood of the Lehigh Valley Railroad crossing at Royce Valley, it was 33 feet in width and was paved with macadam 12 feet in width.

This route in the neighborhood of the crossing (except as hereinafter stated) has since been established at the width of 66 feet and the Commission has or is about to acquire by condemnation, purchase or otherwise, the land necessary for such width, and the highway is being cleared of fences and other obstructions within such width. It has been repaved with concrete 20 feet wide.

For a distance of 535$\frac{1}{2}$ feet measured along said highway north from the centre line of the right-of-way of the Lehigh Valley Railroad, and for the distance of 515 feet measured along said highway south from its intersection with said centre line, no final action has been taken by the Highway Commission to complete widening of said highway right-of-way or to pave it with a permanent pavement. The Highway Commission has postponed widening and improving this stretch of Highway No. 16 until the conclusion of the grade crossing hearing lately held before the Board of Public Utility Commissioners and of the litigation now pending over their order. The Commission has felt that so long as the exact

location of the crossing remains in doubt, it is unwise to require the additional width or to proceed with the improvement of this section of the highway. While, of course, I cannot state what official action the Highway Commission will take, I can say that the engineering staff will recommend to them that this section of the highway have an established width of 66 feet and that it be paved with a concrete pavement 20 to 40 feet in width up to the tunnel under the railroad track or the immediate approaches to the tunnel.

CHARLES F. BEDWELL.

Sworn and subscribed before me
this 8th day of June, 1927.

JULIUS J. NEWMARK,
Notary Public of New Jersey.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY. } ss.:

A. LEE GROVER, being duly sworn according to law, on his oath says:

I am the Secretary of the State Highway Commission and have been such Secretary for ten years, and I am the custodian of the minutes and records of the Commission. I have examined the same and there appears in the minutes of the meeting of the State Highway Commission held March 11, 1924, the following:

> "State Highway Engineer Sloan presented for the consideration of the Commission alternate schemes for grade crossing elimination in South Somerville, in which he recommended the adoption of plan "C" at a total estimated cost of $109,024.00, involving a structure with a center pier in the

highway, leaving 18 feet of roadway on each side of the pier, the railroad company to share in the cost of this improvement to the extent of $40,000. On motion by Mr. Kidde, seconded by Mr. Jelin, the State Highway Commission approved plan "C" for the elimination of Lehigh Valley Railroad Crossing at South Somerville, and directed that this elimination be proceeded with and that $40,000.00 be accepted from the Lehigh Valley Railroad Company as its proportionate share of the cost."

There does not appear in the minutes of the State Highway Commission meetings any further record of any agreement or authorization for execution of any agreement between the Commission and the Lehigh Valley Railroad Company for the elimination of the grade crossing of Highway Route #16 with said railroad at Royce Valley.

I am informed that the plan referred to as plan "C" in the above extract from the minutes of the meeting of March 11, 1924, provided for moving the crossing about 150' easterly and that it provided for a corresponding change in the route of the highway. No action has ever been taken by the Commission to vacate the existing route or to return it to the County of Somerset or to acquire or lay out a new route in accordance with such plan "C."

The matter of this crossing again came before the Commission March 24, 1925, and the following action was taken as shown by the minutes of the Commission:

> "'Mr. Jelin stated that he had given this matter very serious thought since the last meeting and it was his belief that an application should be made to the Public Utility Commission looking

toward the Railroad Company paying for the elimination of the grade crossing, and that the State Highway Commission should adopt the line on its present alignment rather than put a curve in the road.

"Commissioner Kidde stated that he believed this question would result in holding up the program on grade crossing elimination, which had been so successful in the past, because it would prevent the co-operation between the State and the railroads as before. Commissioner Stewart stated that he believed that in view of the recent decision from the Supreme Court of the United States to the effect that Public Utility Commissions can direct railroad companies to eliminate grade crossings, it is almost mandatory upon the State Highway Commission to adopt such a motion before proceeding into any negotiations with railroad companies.

"Commissioner Jelin stated that there was the further reason that the public opinion in this particular locality was unanimous with regard to this condition, and he moved that the State Highway Engineer be instructed to make application to the Public Utility Commission for an order requiring the Lehigh Valley Railroad Company to eliminate the grade crossing on Route #16, South Somerville, at Royce Valley Station, and further that there should be eliminated from the contract for paving the amount of work on each side sufficient to accommodate the elimination of the railroad crossing. This was seconded by Mr. Stewart and adopted.'"

A. LEE GROVER.

Sworn and subscribed before me
this 10th day of June, 1927.

KENNETH D. RICE,
Notary Public.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY. } *ss.:*

CHARLES A. MEAD, being duly sworn according to law, on his oath says:

I am the Chief Engineer of the Division of Bridges and Grade Crossings of the Board of Public Utility Commissioners; I had charge, for the Board, of the preliminary studies relative to the elimination of the grade crossings of the Lehigh Valley Railroad with State Highway Route #16 and Camp Lane, at Royce Valley, and I attended the hearings of the Commission on this matter and studied the various plans and figures which were presented.

Route No. 16 runs in a southwesterly direction across the railroad, it runs in a straight line for a distance of about 2,000 feet north of the railroad and 2,500 feet south of it. The railroad at this point runs southwesterly, the angle of divergence between the railroad and the highway being 29.50.

Camp Lane begins at Route #16, at a point north of the railroad and about 1,200 feet distant therefrom measured along the line of Route #16; it runs in a southeasterly direction and crosses the railroad at a point about 1,400 feet east of the Route #16 crossing. Camp Lane then proceeds in a southerly direction about two miles.

Two plans of elimination of these crossings were presented to the Commission, one of which was presented by me and one by the Railroad Company. The plan pre-

sented by me, in a somewhat modified form, was adopted by the Commission and is attached to their Order in this matter. That plan, in general, provides for depressing the highway and carrying it under the railroad track at a width of 66 feet, this width is divided into a central pier of 5 feet, two roadways of 20 feet each and two sidewalks of 10 feet 6 inches each. Columns on the edge of the sidewalks reduce the usable width thereof to 8 feet 6 inches. This plan contemplates no change in the location of the highway but maintains it in its present straight line.

Some objection was made by representatives of the township of Somerset County, to the plan presented by me because it provided for a center pier. The absence of the pier would of course, increase the length of the spans and greatly increase the cost of the railroad bridge.

The railroad plan provided for the vacation and abandonment of the highway where it crosses the railroad right-of-way, so that Route #16, as at present laid out, would come to a dead end both north of the railroad and south of the railroad. This plan further provided for the laying out and establishing of a new stretch of highway which would cross the railroad about 400 feet east of the present crossing and would connect with Route #16 both north and south of the railroad. This new highway, according to the railroad plan, would begin at Route #16 at a point about 1,000 feet north of the intersection of said route with the center line of the railroad bridge; it would first curve to the east or left with radius of 955 feet and an arc of about 400 feet, it would then have a straight course of about 250 feet to the entrance of a tunnel under the railroad, the straight course would continue under the railroad for about 100 feet on the southerly side thereof where a second curve would commence, viz. to the west or right with the same radius and an arc of about 1,000 feet, then a third curve to the east

or left with the same radius and an arc of 400 feet and back into Route #16 at a point about 1,000 feet south the intersection of that route with the center line of the railroad.

The railroad plan showed a profile indicating that a great part of this proposed new highway and all of it near to the railroad would be in a cut of varying depths, in some places as deep as 10 feet.

Both the railroad plan and the plan adopted by the Commission provided for much the same treatment of Camp Lane. The south part of Camp Lane would be connected with Route #16 by an extension running westerly and generally parallel with and south of the railroad, to a point of intersection with Route #16, but this connection would join Camp Lane, according to the railroad plan at such a distance from the railroad as to leave about 1,400 feet of Camp Lane as a cul-de-sac south of the railroad, against 200 feet by the plan adopted. That portion of Camp Lane north of the railroad would be converted into a blind alley with a dead end at the railroad property. The Camp Lane crossing would be vacated and in effect consolidated with the Route #16 crossing.

The plan of elimination as originally presented by the Railroad Company provided for two roadways of 18 fee each and a center pier of about 5 feet, making a total width of 41 feet. The estimates of cost first submitted were based on such a roadway but at a later hearing were revised to provide for roadways of 20 feet each and sidewalks of the same width stated in the Commission's plan, bringing the angle of divergence between the highway and the railroad, according to the railroad plan, to 54 This would make the tunnel under the railroad, measured along the center pier, about 75 feet long by the railroad plan as against 105 feet by the Commission plan; it would also allow a cheaper bridge to support the railroad pro-

narily because the beams running parallel with the railroad would be shorter according to the railroad plan than according to the Commission plan.

The following table shows a comparison of the cost of the two plans. The items are not strictly comparable because certain figures are included in one item in the first column and in another in the second.

	Commission Plan Page 93	Railroad Plan Exhibit RR 8 and 9
Temporary support for tracks	$ 35,880.00	$ 14,022.00
Sub-structure	88,840.00	29,970.00
Super-structure	95,240.00	18,760.00
Track work	7,350.00	6,500.00
Bridge incidentals		6,925.20
Culvert and drainage	17,250.00	15,140.40
Land and damages		1,000.00
Paving and curbing	13,970.00	16,335.00
Preparing detour	6,000.00	
Camp Lane Road	10,450.00	7,660.23
Additional work	40,860.00	
Grading		29,040.00
Miscellaneous		3,581.87
Interest	8,560.00	3,750.00
Total	$324,400.00	$152,684.70
Additional cost to increase roadways from 18 feet to 20 feet and to add sidewalks		52,500.00
Revised Total		$205,184.70

The Liberty School is on Route #16 south of the railroad.

All of the foregoing facts appeared in the evidence and exhibits presented to the Commission.

(Signed) CHAS. A. MEAD

Sworn and subscribed before me
this 8th day of June, 1927.

HELEN D. WOODRUFF
(SEAL) Notary Public of N. J.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

H. P. BRAINARD, being duly sworn according to law, on his oath says:

I am one of the official stenographers of the Board of Public Utility Commissioners of New Jersey. As such I took stenographic notes of the proceedings before the Commissioners in the matter of the elimination of grade crossing known as South Bridge Street, or State Highway No. 16, and tracks of the Lehigh Valley Railroad Company, in the Township of Hillsboro, Somerset County.

The hearings commenced on December 16th, 1926. Mr. E. H. Burgess and Mr. W. R. Johnston appeared for the railroad company. The first witness sworn was Mr. Alfred N. Barber, Secretary of the Board, who merely proved mailing of certified copies of the order of the Board initiating the proceedings.

The next witness was Charles A. Mead, Chief Engineer of the Division of Bridges and Grade Crossings of the Board. He proved photographs of the crossing of the railroad and State Highway No. 16 and Camp Lane and the same were admitted in evidence. He also proved a blue print of a survey showing the relation of the railroad to the two highways and this was admitted in evidence. He testified to a traffic count on the railroad on November 12th and 13th, 1926 as follows: passenger trains—18 and 17; freight trains—34 and 37; light engine and drill movements—10 and 10 respectively; and to a traffic count on Route No. 16 on said days, namely, pedestrians—45 and 11; automobiles—1246 and 7608; other vehicles—17 and 13; and on Camp Lane crossing on said days: Pedestrians—23 and 12; automobiles—83 and 89; other vehicles—4 and 1.

Mr. Mead offered a schedule showing said traffic counts and the same was admitted in evidence.

The witness then testified that he had developed a scheme for eliminating the crossing of Highway Route No. 16 and the crossing of Camp Lane with the railroad and described said plan and offered in evidence a map or plan showing how these crossings would be eliminated.

At the conclusion of the testimony of Mr. Mead, Mr. J. F. Reger, who was present representing the Township of Montgomery, stated in part: "I don't know whether counsel for the railroad at this time will state whether the question will be raised whether that is a dangerous crossing and whether travel is impeded or any other questions of a preliminary nature." A colloquy then followed between Commissioner Gnichtel and Mr. Burgess in which Mr. Burgess among other things stated: "We are not raising any serious question about the dangerous condition at this crossing," and also, "We are perfectly willing to agree without joining issue on the question of the danger." Commissioner Gnichtel then said: "You put it in a way that if this case went up it might be reversed on that one issue and it might be a very unfortunate thing if that was the issue on which the case was reversed rather than the point in question. What you said was this: You made no serious contention on that question. It seems to me that might leave the question still open and we better put a more proof."

Mr. Burgess finally said "I don't want to take the time of the Commission on that question. I am perfectly willing to make it more broad than I did make it. If I used the word serious I withdraw the word serious and consent to the necessity for the elimination."

After further discussion of other matters Mr. John W. Queen, counsel for the Commission, stated: "I might call to the Commission's attention that we have prepared the evidence on the questions involved in the notices as to its being a dangerous crossing and as to its being such

as to impede traffic but these questions are now out of the way by the admission of the counsel for the railroad."

At that point Mr. Johnston was sworn on behalf of the railroad company and was examined by Mr. Burgess and testified that a plan "to eliminate this crossing" had been prepared by the company's engineers. Mr. Burgess then offered the plan in evidence and it was marked Exhibit RR. 1. It provided a scheme for the elimination of Highway Route No. 16 crossing. Mr. Johnston testified that this plan permitted "the Camp Lane Road to be diverted to join this route with less highway construction," and that a plan had also been prepared for the elimination of the Camp Lane crossing and this was offered in evidence by Mr. Burgess and marked Exhibit RR. 2.

At the hearing before the Commission on March 17th, 1927, George Hill, president of the Board of Education of Hillsboro Township, testified that the grade school known as the Liberty School was located about a quarter of a mile south of the railroad tracks; that the district from which scholars attended the school extended north of the tracks as far as the Raritan River; that he had scholars crossing and re-crossing this road from the north side to the Liberty School House. He was asked: "Is it the smaller children that walk from the north side to the Liberty School on the south side of the railroad?" Answer: "From the eighth grade down." He further testified that none of the children attending this school were taken to and from the school by bus or other vehicle but that they walked.

(Signed) H. P. BRAINARD.

Sworn and Subscribed before me this 9th day of June, 1927.

(Signed) HELEN D. WOODRUFF

(SEAL.) Notary Public of N. J.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

ALFRED N. BARBER, being duly sworn according to law, on his oath says:

I am the Secretary of the Board of Public Utility Commissioners of the State of New Jersey, one of the defendants in the above entitled cause. I have been such Secretary since the organization of the Commission in 1910. I know of no criminal prosecutions which have been instituted for violation of the provisions of the Public Utility Act or for violation of any order of the Commission. During that period there have been no suits for the penalty of One Hundred Dollars ($100.00) a day for violation of the Commission's orders as prescribed by that Act. The customary method of securing compliance with the orders of the Commission commanding certain acts to be done is a proceeding by mandamus.

Referring to the grade crossing order, the subject of this litigation, the Commission has not threatened any criminal prosecution or action for a penalty and has not adopted any resolution or other action looking towards such criminal prosecution or suit and so far as I know the Board does not contemplate any such criminal prosecution or suit.

Attached hereto is a true copy of the Commission's decision which was referred to and made part of the order of the Commission, dated April 26th, 1927, relative to the crossing of the Lehigh Valley Railroad and State Highway Route No. 16 and Camp Lane.

(Signed) ALFRED N. BARBER.

Sworn and subscribed before me this 9th day of June, 1927.

HELEN D. WOODRUFF,
(SEAL) Notary Public of N. J.

Supreme Court Opinion.

NEW JERSEY SUPREME COURT.

LEHIGH VALLEY RAILROAD COMPANY, *Prosecutor*,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, *et al.*

Reported 137 Atl. 443.

Application to Justice Parker at Chambers for allowance of writ of certiorari with a stay, to review order of the Board of Public Utility Commissioners requiring the Railroad Company to substitute for the present grade crossing an underpass on State Highway No. 16 at Royce Valley Station in the County of Somerset.

For the prosecutor, Hobart & Minard.

For the Board, John O. Bigelow.

For the County of Somerset, Clarence E. Case.

For the State Highway Commission, Fred W. DeVoe.

Memorandum by Parker, *J.*

The importance of the matter calls for a speedy decision, especially as the allowance of a writ would accomplish little or nothing unless a stay be superadded, the writ, by statute, not carrying a stay *ex proprio vigore* in these cases; and on the other hand, if a stay were allowed, an important public work already delayed too long, would be further postponed.

The grade crossing at Royce Valley is one with which I am familiar, having passed it many times on State Highway No. 16. It is a dangerous crossing on an important road, which all parties agree should be eliminated.

State Highway No. 16 leads from Somerville to Princeton, and the work of widening it to an uniform width of 66 feet is in progress. The railroad crosses it at an acute angle of 29 degrees thirty minutes. Both railroad and highway are straight for some distance, the highway over 3000 feet south of the railroad, and about 2000 feet to the north of it. Any underpass means a more or less deep cut. The principal question in dispute before the Board was whether this underpass and its incidental cut should be kept straight, and on the line of the present road, or, in order to cross under the railroad more nearly at right angles than at present, the highway (as one goes north from Princeton) should be deflected to the right or eastward, then to the left crossing under the railroad at an angle of some 54 degrees as I recollect it, then again to the left or westward and finally to the right, joining the existing road north of the railroad. This would carry the highway to the east of the present station by a double reverse curve of not over 6 degrees at any point. The Board rejected this plan offered by the railroad and as it appears to me with entire propriety. It is asserted in the affidavits that a 6 degree curve is a perfectly safe curve. Very likely it is, where the road is on a level and the visibility is unimpaired; but between the walls of a cut, any curve is objectionable and usually dangerous. No escape has yet been found for preventing the careless motorist, and all too many of them are careless, from hugging the inside of a curve, in whatever direction he may be going. The requirement of a straight road at such a place as this is essentially sound, and to turn a great State road at such a place from a straight line to a crooked one would be to court constant disaster. The view of the Board on this point meets with my entire concurrence. The expense may be somewhat greater than by the railroad plan, but as noted by the Board, the rail-

road figures omit important items which would go far toward equalizing matters.

This seems to be the crux of the application. I have no doubt whatever about the jurisdiction of the Board. It is not claimed, I think, that it was challenged at the hearing. As to the alleged unreasonableness of requiring an underpass 66 feet wide, there are at least two answers. One is that this is the settled future width of the road, to which it is actually being worked. The other is that the railroad's own plan called for this same width, merely at a less acute angle. Nothing is to be gained, and much is to be lost, by choking traffic at such a place. This is a permanent improvement, and an eye to the future requires that it be adequate to reasonably anticipated future needs. On the same theory the provision of space for sidewalks is justified. The rights of foot passengers on State roads have been too long overlooked, and they are receiving attention none too soon.

As to the Camp Lane phase of the matter, it is mainly incidental. Camp Lane appears to be a minor road, crossing the railroad at grade some 1200 feet eastward of the Highway No. 16, crossing. The order requires the closing of Camp Lane crossing and the diversion of that road south of the railroad so as to join Highway No. 16. This is quite within the jurisdiction of the Board and similar action has been taken by that body more than once. I see nothing vulnerable in this part of the case.

It may be well to add that it was stated on the argument that this underpass is to have a double use, for a new State highway is projected from Lambertville to a point on No. 16 south of the railroad, then following No. 16 to a point north of the railroad, and then diverging eastward toward Bound Brook. Such a situation of course emphasizes the need for ample room under the railroad.

I conclude that allocature of a writ should be denied, without prejudice, of course, to an application to the court *in banc*.

Supreme Court Decision.

NEW JERSEY SUPREME COURT.

LEHIGH VALLEY RAILROAD COMPANY, *Prosecutor,* vs. BOARD OF PUBLIC UTILITY COMMISSIONERS, *et al.*, *Defendants.*	*On Application for Writ of Certiorari.* *Order.*

The Lehigh Valley Railroad Company, the prosecutor in the above entitled cause, having made application to this Court for a writ of certiorari to review a certain order of the Board of Public Utility Commissioners of New Jersey, for the elimination of grade crossings known as South Bridge Street or State Highway Route No. 16 and Camp Lane in the Township of Hillsborough, Somerset County, New Jersey, and having given due notice of said application to the said Board of Public Utility Commissioners, the State Highway Commission, the Board of Chosen Freeholders of Somerset County and to the Township of Hillsborough in the County of Somerset.

And this matter being opened to the Court by Messrs. Hobart & Minard, attorneys for said prosecutor, in the presence of John G. Bigelow, counsel for the Board of Public Utility Commissioners, Fred W. DeVoe, Assistant Attorney-General, counsel for the State Highway Commission, John F. Reger, counsel for the County of Somerset, and Clarkson A. Cranmer, counsel for the Township of Hillsborough,

And the Court having considered the said order of the Board of Public Utility Commissioners, and the decision

of said Board dated April 26, 1927, in the matter of the elimination of said grade crossings, and the affidavits of William R. Johnston, and the exhibit annexed thereto, filed by said prosecutor, and also the affidavits filed by said defendants,

And the Court having considered the reasons in support of said application set forth in the brief filed in behalf of the prosecutor, and having considered the arguments of counsel, and being of the opinion that no sufficient reason appears for the issuance of said writ,

It is ORDERED that the said application for a writ of certiorari be and is hereby denied.

Dated: May 31, 1927.

By the Court,

THOMAS W. TRENCHARD, J. S. C.

Entered June 6, 1927

Entered on motion of

JOHN O. BIGELOW
Counsel for Board of Public
Utility Commissioners.

Petition for Rehearing.

Filed July 15, 1927.

To the Hon. J. Warren Davis, Circuit Judge, and Hon. Joseph L. Bodine and Hon. Wm. N. Runyon, District Judges, Judges of said Court.

The petition of Lehigh Valley Railroad Company, the plaintiff herein, respectfully shows:

1. The order to show cause granted herein on June 1, 1927, was argued before this Honorable Court on June 10, 1927.

2. On June 28, 1927, the decision of the Court was filed, denying with costs the interlocutory injunction prayed for in the bill of complaint.

3. It appearing from the bill of complaint and the affidavits and exhibits filed herein, that the plaintiff applied to the Supreme Court of the State of New Jersey for a writ of certiorari, which is the proper remedy in such case under the laws and practice of said State (and the only method of review of said order allowed under the "Act concerning public utilities" &c., of said State), to review said order of said Board and that said application was denied.

4. On the argument of the order to show cause, the Court's attention was not called to the decision of the Supreme Court of the United States in the case of *Ohio Valley Water Company* v. *Ben Avon Borough* (253 U. S. 287). That case involved an order of the Pennsylvania Public Service Commission, fixing water rates.

On appeal of the Water Company from this order to the Superior Court of Pennsylvania, that court differed from

the commission as to the proper valuation to be placed upon several items entering into the fair value of the property, and reversed the order.

On appeal, the Supreme Court of the State of Pennsylvania sustained the order on the ground that there was competent evidence tending to sustain the commission's conclusion, and no abuse of the discretion appeared, and that the Superior Court (the court below), should not have interfered therewith and that the Superior Court had merely substituted its judgment for that of the commission, in determining that the order of the commission was unreasonable. Thereupon the Water Company took a writ of error to the Supreme Court of the United States, where the case was presented and argued chiefly on the ground that the order confiscated the property of the Water Company and that the Pennsylvania Public Service Company law, by authority of which the order was made, deprived the company of a judicial determination as to both law and facts on the issue whether said order confiscated the plaintiff's property. The Supreme Court of the United States reached the conclusion that the Supreme Court of Pennsylvania had interpreted the Pennsylvania statute as withholding from the courts power to determine the question of confiscation according to its own independent judgment when the action of the commission comes to be considered on appeal, and held (p. 289):

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting the issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th amendment."

Other cases involving this question, subsequently decided by the United States Supreme Court, are as follows:

Keller v. *Potomac Electric Power Co.*, 261 U. S. 428;

Bluefield Water Works & Improvement Co. v. *Public Service Commission*, 262 U. S. 679;

Dayton-Goose Creek Ry. v. *U. S.*, 263 U. S. 456;

Ohio Utilities Co. v. *Public Utilities Commission*, 267 U. S. 359;

Northern Pacific Ry. v. *Department of Public Works*, 268 U. S. 39.

5. The following questions of law, involved in the above mentioned cases, as applicable to the instant case, were not sufficiently argued.

I.

That the denial by the New Jersey Supreme Court of a review of said order of the Board of Public Utility Commissioners made April 26, 1927 (described in the bill of complaint), deprived the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property.

II.

The statutes of the State of New Jersey under the authority of which said order of said Board was made, to wit: "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers" approved April 21, 1911 (being Chapter 195, Laws of New Jersey for 1911, p. 374), and its various

amendments and supplements, including an act entitled "An act to amend an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty-first, one thousand nine hundred and eleven," approved February 26, 1918 (being Chapter 130, Laws of 1918, p. 304), and an act entitled "A supplement to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty-first, one thousand nine hundred and eleven," approved March 12, 1913 (being Chapter 57, Laws of 1913, p. 91), deprive the plaintiff of its property without due process of law, in that thereby the plaintiff is deprived of the right to a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property.

6. These questions of law are pertinent to the present case because the denial of the New Jersey Supreme Court to review said order of said Board by writ of certiorari deprived the plaintiff of the right to a determination by a judicial tribunal, as to both the law and the facts, on the issues of confiscation and the lack of due process, alleged in the bill of complaint.

7. These questions are also pertinent to the present case because the New Jersey Public Utilities Act (above referred to) under the authority of which said order of said Board was made (Section 38) limits the plaintiff to a review of such an order by writ of certiorari from the Supreme Court, and the jurisdiction of said court to set aside such an order in whole or in part is limited by said statute to instances when it clearly appears that there

was no evidence before the Board to support reasonably the same or that the same was without the jurisdiction of the Board.

Wherefore the plaintiff prays that a re-argument of the rule to show cause be granted to enable it to properly argue the aforesaid questions of law.

LEHIGH VALLEY RAILROAD COMPANY,

By HOBART & MINARD,
Solicitors.

GEO. S. HOBART,
DUANE E. MINARD,
Of Counsel.

CERTIFICATE.

We hereby certify that this petition for rehearing is presented in good faith and not for delay.

GEO. S. HOBART,
DUANE E. MINARD,
Of Counsel.

Filed July 15, 1927.

Answer of Defendant Board of Public Utility Commissioners to the Petition for Rehearing.

Filed July 28, 1927.

This defendant says that nothing appears in the petition for a rehearing whereby the court should be moved to grant a re-argument of the rule to show cause herein, and therefore this defendant prays that the said petition may be denied and that an order may be entered pursuant to the opinion of this court lately filed in this cause.

Plaintiff relies on *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 40 S. C. 527. That decision holds:

1. A party affected by an order of a Public Utility Commission is deprived of his property without due process of law and the order is void unless the state provides an opportunity for submitting to a judicial tribunal on both the law and facts, the question whether such order is confiscatory.

2. This rule obtains even though the order is not confiscatory and even though the party may have a review of the law and the facts in a federal court.

3. A review in which the court is bound by the Commission's conclusion on the facts, if that conclusion is supported by some competent evidence, is not sufficient to constitute due process of law.

The Supreme Court did not hold that the order of the Pennsylvania Commission was void on the ground above stated but merely remitted the record to the courts of Pennsylvania in order that a sufficient judicial investigation of the law and the facts might be afforded the Water Company. The courts of Pennsylvania then proceeded with that inquiry.

Ben Avon Borough v. *Ohio Valley Water Co.*, 114 Atl. 369.

In *Keller v. Potomac, etc. Co.*, 261 U. S. 428, 43 S. C. 445, one paragraph of the statute creating the commission, narrowly restricted the right of review in the courts. It was held that the statute as a whole was not thereby made unconstitutional but only the sections attempting to restrict the judicial power.

Dayton Goose Creek Railway v. U. S., 263 U. S. 456, 44 S. C. 169.

The utility is not denied due process merely because the statute authorizing the Commission's action does not contain provisions for judicial review. It is enough if opportunity for such review is provided independent of the statute.

Plaintiff necessarily contends, in order to make the rule in the Ohio Valley Water Company case material to the suit now before the court, that the State of New Jersey does not provide in any of its courts and in any form of proceeding the right to a determination by a court on both the law and the facts of the issue of confiscation. If the State does provide a right to such a determination, then the sole reason advanced for a rehearing fails.

Plaintiff's contention is startlingly broad. The same judicial review—or lack of judicial review—is provided in grade crossing matters as in all other matters that come before the Public Utility Commission. If the order in this case is void because no sufficient judicial review is provided, then all orders of the Commission are void.

Furthermore, the action of all similar state agencies such as the Tenement House Commission, and of municipal agencies such as Building Departments and Boards of Health, would be subject to the same invalidity, for a person aggrieved by an act of such state or municipal agency has no remedy in the state courts which is not open to the plaintiff in this case.

The remedies afforded the plaintiff in the courts of New Jersey must be considered.

First is the remedy by certiorari. In such a proceeding, the Supreme Court is not bound, as the state court appeared to be bound in the Ohio Valley Water case, by the findings of the statutory tribunal but has constitutional power of which it cannot be deprived by Legislature to inquire independently into the facts.

> *Dubelbeiss* v. *West Hoboken*, 82 N. J. L. 683, 82 Atl. 897.
>
> "When the investigation of questions of fact is required for the proper review of ordinances or other municipal proceedings, the Supreme Court has power by its constitutional jurisdiction to consider such matters of fact."
>
> *Public Service Gas Co.* v. *Board*, 84 N. J. L. 463, 87 Atl. 651.

See also Certiorari Act, section 11.

Plaintiff contends that it was deprived of this right of review by the refusal of the Supreme Court to take jurisdiction.

The opinion of Justice Parker and the recitals in the order of the Supreme Court denying the certiorari, show that the application was heard on its merits both as to law and facts and that the plaintiff failed *in limine* to show reasonable ground for its contention that the Commission's order was confiscatory or otherwise invalid.

The United States Supreme Court said of the refusal to allow a certiorari in *Napa Valley Electric Co.* v. *Board*, U. S. 366, 40 S. C. 174:

> "In those cases the applications for writs of certiorari were denied which was tantamount to a decision of the court that the orders and decisions

of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California."

But assuming that the plaintiff has no sufficient right of review on certiorari, it is not without remedy. We would distinguish between the order of the Commission and the enforcement of that order. The order itself does not affect the property of the plaintiff—despite the order the grade crossing remains and the plaintiff is put to no expense. The enforcement of the order can only be effected by a judicial proceeding by mandamus or otherwise, in which the plaintiff may assert that the order is unconstitutional, and in such proceeding plaintiff may have the independent judicial investigation requisite to due process and this investigation would precede any taking of plaintiff's property.

If it be contended that meanwhile the penalty of $100 a day prescribed by the statute would run, and that this accrual of the penalty before the judicial review was afforded, is a taking of property without due process, we would reply that assuming this contention to be correct, only the penalty provision of the statute would thereby fail and not the statute as a whole or the order of the Commission.

Lastly, if none of the remedies at law above stated are adequate, the plaintiff has a remedy in equity in the state courts in a suit for injunction. It is true that in such a suit it would have to satisfy the Court of Chancery that its remedy at law was inadequate, and this it might fail to do. But if it could so satisfy the court, the suit in equity would lie.

Allen v. Distilling Co., 87 N. J. Eq. 531, 100 Atl. 620. "So long as courts of equity are to serve the

purpose of the creation of the Court of Chancery of England—and in this State the Court of Chancery is the successor in all that such term applies, of that court—jurisdiction must depend only upon the existence of, or a threatened wrong, and the absence of an adequate remedy at law • • • . Due to our habit of endeavoring to find decided cases to fit each situation, we too often overlook the fundamental reasons for the creation or evolution of the court. It received no grant of express powers nor were express duties imposed upon it. The law courts were left to deal with the violation of all rights for which they could give an adequate remedy. The duty of relieving against any remaining wrongs was imposed upon the Court of Chancery."

Before the constitutional amendments of 1873, the functions now performed by commissions were frequently accomplished by special acts of the Legislature. The acts of the Legislature could not be reviewed by certiorari, and hence a person injured thereby frequently had no remedy at law but obtained relief in equity. Such a case is *Glover* v. *Powell*, 10 N. J. Eq. 211.

The courts of New Jersey afford protection for rights of all kind.

Respectfully submitted,

THE BOARD OF PUBLIC UTILITY COMMISSIONERS,

By JOHN O. BIGELOW,
JOHN W. QUEEN,
Of Counsel.

Exhibit "A?"

(Attached to Bill of Complaint.)

STATE OF NEW JERSEY.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

In the Matter of Proceeding under Chapter 57, P. L. 1913, relating to the crossing of the highway known as South Bridge Street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad Company in Hillsboro Township, Somerset County.	Order.

This matter having been heard by the Board and the Board, on the date hereof, having filed its decision stating its finding of fact and conclusions thereon, which decision by reference thereto herein is hereby made part hereof, the Board orders the Lehigh Valley Railroad Company to alter the crossings known as South Bridge Street or State Highway Route No. 16 and the Camp Lane according to the plan therefor annexed to and made part of this order which plan is shown on two sheets, known as "Scheme 'H. P.' Board of Public Utility Commissioners, Division of Bridges & Grade Crossings, Survey in the Vicinity of Royce Valley Station, L. V. R. R., Scale 1"—50', November 20, 1926," and Profile marked "Scheme 'H. P.' Profile on Center Line of State Highway Route No. 16, Section 5A, traced from N. J. State Highway Map, Sheet 11/31," which said plan, with the relocation of Camp Lane as

shown by red center line having been approved by said Board, and by reference thereto herein is made part hereof), by substituting therefor a crossing not at grade of the said public highways, by changing the lines, width and directions thereof and by carrying so much as so changed under the said railroad, according to and as shown on said plan for said purpose, and by vacating the remaining part of said highway or highways, within the lines of the right-of-way of said railroad company, and by the opening of new highways, in the place of the ones hereby ordered vacated as aforesaid, which said new highways shall be of the width, length and direction and carried under the said railroad where so indicated, all according to and as shown on the said plan.

Any telegraph, telephone, gas, electric, lighting, power water, oil, pipe lines or other company or corporation, copartnership or individual whose property or constructions it may be necessary to change or remove to carry said plan and this order into effect, shall remove and change the same according to said plan.

And it is further ordered that the said the Lehigh Valley Railroad Company, the said Hillsboro Township, and the said Township Committee thereof, the County of Somerset, the New York Telephone Company, the Western Union Telegraph Company, the Hillsboro and Montgomery Telephone Company, the Public Service Electric and Gas Company, and all other parties to this proceeding, and each and every of them, proceed with due diligence to the execution of this order, and comply with all of the requirements thereof and the duties imposed upon them thereby, and by the said Act under which this order is made, and the laws of this State, and that to that end they and each of them exercise in good faith all of the powers conferred upon them and each or any of them by the laws of this State.

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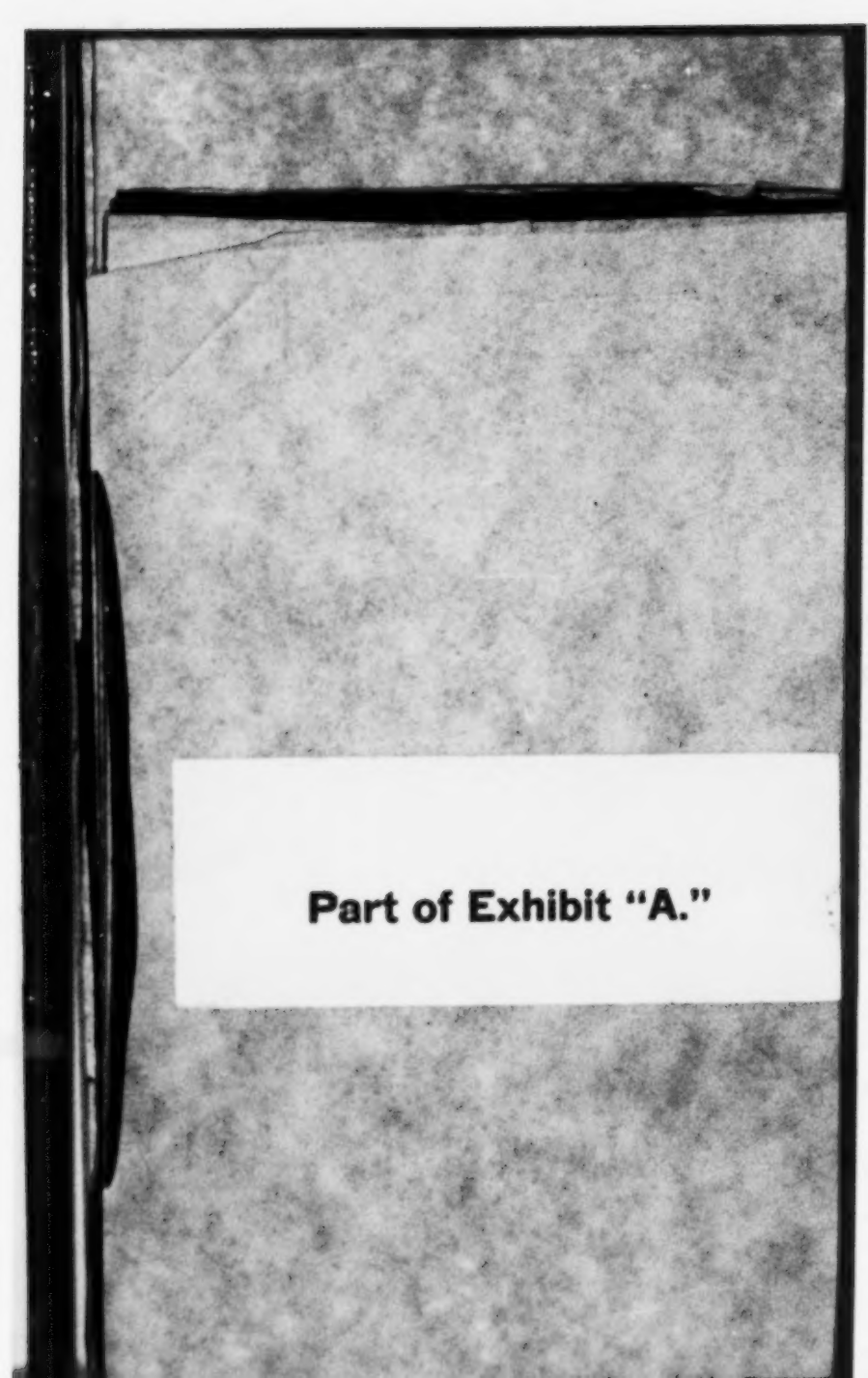
Part of Exhibit "A."

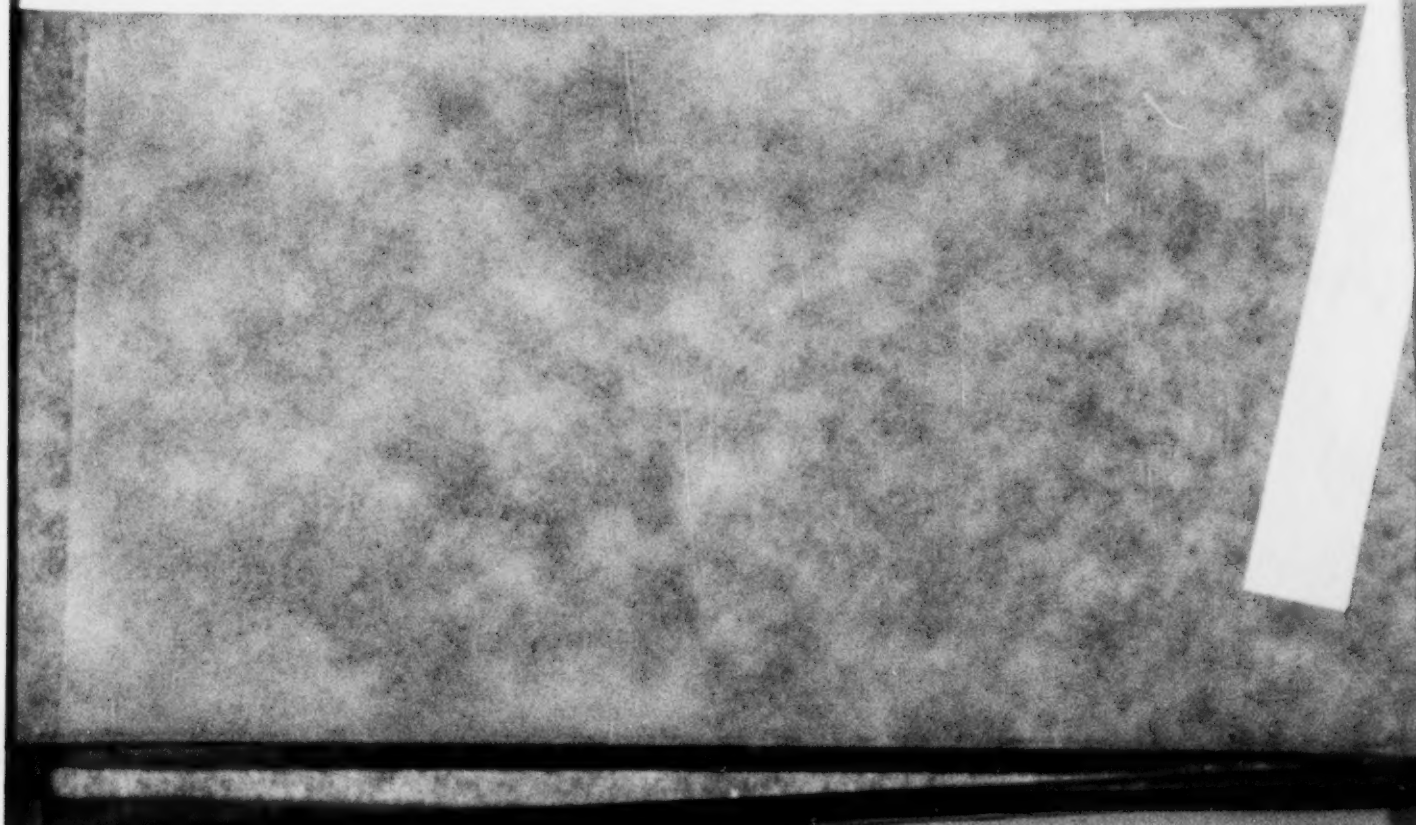

Exhibit A—Order of Commissioners.

AND IT IS FURTHER ORDERED that the said the Lehigh Valley Railroad Company begin the actual work required in the performance and execution of this order on or before the first day of June, 1927, and perform and fully comply with the directions and requirements of this order, and complete all of the work required thereunder to be done within one year thereafter, or the first day of June, 1928.

This order shall take effect May 10th, 1927.

Dated April 26th, 1927.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

By (Signed) JOS. F. AUTENREITH,
President.

(Seal)

Attest:

(Signed) ALFRED N. BARBER,
Secretary.

I hereby certify the foregoing to be a true copy of an Order adopted by the Board of Public Utility Commissioners at its meeting held Tuesday, April 26th, 1927, and recorded in the minutes of said meeting.

ALFRED N. BARBER,
Secretary.

(Seal)

Exhibit "A."

(Annexed to Johnston Affidavit—May 31, 1927.)

STATE OF NEW JERSEY

BOARD OF PUBLIC UTILITY COMMISSIONERS

In the Matter of Proceeding under Chapter 57, P. L. 1913, Relating to the Crossing of the Highway Known as South Broad Street or State Highway Route No. 16, and the Tracks of the Lehigh Valley Railroad Company in Hillsboro Township, Somerset County.	Order.

The Board of Public Utility Commissioners, by virtue of the powers conferred upon it by statute, hereby initiates a proceeding and calls a hearing to determine whether South Broad Street or State Highway, Route No. 16, in the Township of Hillsborough, County of Somerset, State of New Jersey, is a public highway and whether the said street crosses in the said Township of Hillsborough a railroad operated by the Lehigh Valley Railroad Company, and whether such crossing is dangerous to public safety or whether the public travel on such highway is impeded by such crossing and to determine what, if any, order shall be issued by said Board for the alteration of said crossing by substituting therefor a crossing not at the grade of such public highway under or over said railroad or by reconstructing such railroad under or over such public highway, or by vacating, relocating, or changing the lines, width, direction or location of such highway and the opening of a new highway in place of the one ordered

cated and to determine any and all other matters, the etermination of which may be within the power of said oard and which may be involved in and incidental to the eparation of the grades of said highway and of said ilroad.

It appears that any order issued by the Board in this roceeding for the separation of the grades of said high- ay and of said railroad may affect a road known as Camp ane in said Township of Hillsborough, which is or may e claimed to be a public highway.

The Board hereby fixes Thursday, the 16th day of De- mber, 1926, and the hour of eleven o'clock in the fore- oon as the time and the rooms of said Board in the In- ustrial Office Building, 1060 Broad Street, Newark, N. J., s the place of the hearing hereby called.

The Board hereby directs its Secretary within ten days om the date of entry hereof to give notice to the Town- ip of Hillsborough and the corporations, co-partner- ips and individuals interested in the hearing hereby alled by sending to the said Township of Hillsborough, the tate Highway Department of New Jersey, the Lehigh alley Railroad Company, the Public Service Electric ompany, the New York Telephone Company, the Western nion Telegraph Company, and the Hillsborough and ontgomery Telephone Company, certified copies of this rder, and publishing in the Unionist Gazette and Somer- t Messenger, newspapers circulating in the Township of illsborough, at least one week prior to the date of the aring hereby called, the notice provided for in Chapter 8, P. L. 1914

The Board hereby determines that such mailing and publication shall constitute reasonable notice of the proceeding hereby initiated and the hearing hereby called.

Dated, November 24, 1926.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

By (Signed) Jos. F. Autenreith
President.

(Seal)

Signed Alfred N. Barber,
Secretary.

I hereby certify the foregoing to be a true copy of an order adopted by the Board of Pubilc Utility Commissioners at a meeting held Wednesday, November 24th, 1926, and recorded in the minutes of said meeting.

ALFRED N. BARBER,
Secretary.

Exhibit "B."

(Attached to Johnston Affidavit—May 31, 1927.)

STATE OF NEW JERSEY

BOARD OF
PUBLIC UTILITY COMMISSIONERS

In the Matter of the Proceeding Under Chapter 57, P. L. 1913, Relating to the Crossing of the Highway Known as South Bridge Street or State Highway Route No. 16, and the Tracks of the Lehigh Valley Railroad Company in Hillsboro Township, Somerset County.

DECISION.

E. H. Burgess for the Lehigh Valley Railroad Company.
J. F. Reger for Township of Montgomery.
C. A. Cranmer and F. C. Young for Township of Hillsboro.
F. W. Remsen for Board of Freeholders of Somerset County.
H. F. Woolston for Citizens on the Highway.
L. F. Schenck for Borough of Somerville.
D. H. Beekman for Board of Education of Hillsboro.
W. R. Epps, Jr., for Himself.
M. Goodkind for New Jersey State Highway Commission.
W. J. Higgins for Western Union Telegraph Company.
P. A. Garrettson for Hillsboro & Montgomery Telephone Company.
G. H. Blake for the Public Service Electric & Gas Company.
H. M. Wright for Himself.

W. Eugene Turton for New Jersey Motoring Federation.

George Layton for Somerset County.

L. M. Hartshorne for Millstone Valley Grange.

W. W. French for Hiawatha Council 110 Jr. O. U. A. M.

On November 24, 1926, the Board entered an order initiating a proceeding and calling a hearing on the question whether the crossing at grade of South Bridge Street or State Highway Route No. 16, and the tracks of the Lehigh Valley Railroad in the Township of Hillsboro, County of Somerset, should be altered by the substitution of a crossing not at the grade of the highway. Notice was given, as required by law, of the hearing.

From the evidence it appears that four tracks of the railroad now cross the highway at grade on an embankment about 8 feet higher than the general level of the highway on each side of the railroad. The tracks are in frequent use by all classes of trains. Both highway and railroad are on a tangent for a considerable distance each side of the crossing. The crossing is on a skew the angle of which is 29° 30'.

The highway is one of a system of State owned roads, admitted to be a public highway and all parties consent to the necessity for the elimination of the grade crossing. Fourteen hundred feet east of the crossing in question is another public highway known as Camp Lane or the Somerville Road which crosses the railroad at grade and which leads into State Highway Route No. 16 north of the railroad at a point 1220 feet from the first crossing. The order initiating the proceeding stated that any order issued by the Board may affect this road. The Board finds this to be a public highway. It is proposed to relocate and change Camp Lane so as to lead it into State Highway Route No. 16 south of the railroad. The Board

nds that both these crossings are dangerous to public afety and that the public travel thereon is impeded by eir existence as grade crossings.

The State Highway in this vicinity is being improved y placing on it a concrete surface much of which is com- leted and is in service. The highway is in process of eing widened to the uniform width of 66 feet, and traightened by reducing the number of curves and in- reasing the radii of sharp ones. Additional property for idening the highway over this crossing has not yet been cquired by the State Highway Department.

Plans, profiles and estimates for the elimination of the rossings were prepared independently by Mr. Mead, Engineer of the Board and by the Railroad Company, the lead plan providing for elimination on the present line f the highway and the Railroad plan providing for limination on a relocation of highway, at a point 400 feet ast of its present location. Both plans provide for carry- ng the highway underneath the railroad with a minimum ertical underclearance of 14 feet. The Mead plan pro- ides for a bridge structure covering the entire width of he proposed right-of-way line of the highway viz. 66 feet etween abutments measured at right angles to the highway; he crossing to be made in four spans—two of them over he sidewalks and two over the roadway. Three lines of upports are provided, two of which are on the sidewalks ack of the curb lines and one of which is a narrow pier ocated on the center line of the highway, which pier may referably be pierced with openings. Two roadways each 0 feet wide between curb lines are provided, which will llow ample room for two lanes of highway traffic in each irection. The highway is carried for this width through he entire length of the under crossing and is then gradu- lly narrowed down to the width of the paved highway on ither side of the bridge. The profile conforming to this

plan is the same as the one adopted by the State Highway Department in setting its profile for the re-constructed highway. The depression in the highway, for the purpose of elimination, is not excessive, the grades of 3% on the north side and 3.16% on the south side are easy and lower than are often found on similar work. Drainage is provided by depressing and rebuilding the culvert which crosses the railroad where the highway does, conveying the water through a deepened ditch in the fields, along the line of the present drain to a proper level. Slight changes made necessary to the existing station and freight house are also provided for. This plan does not involve damages to property nor are the highway conditions, as they may concern property owners, materially changed. To carry out this plan it is proposed to use Camp Lane, from its point of intersection with State Highway No. 16 to and across the railroad and the re-constructed location of Camp Lane as a detour during the construction of the work. The estimated cost of putting this plan into effect, including the re-construction of Camp Lane and the preparation and maintenance of the existing Camp Lane Road as a detour, is $324,400.

The plan submitted by the Railroad Company introduces a diversion of the highway from its tangent location for the purpose of increasing the angle of skew at the bridge, thus shortening it and lessing its cost. The bridge itself is on a highway tangent of 275 feet, extending 250 feet north and 125 feet south of the center line of the railroad. One curve is introduced north of the railroad and two curves are introduced south of it in order to complete this diverted line. This new highway must be built through private property on one side and railroad property on the other side of the railroad. The diversion of Camp Lane is accomplished in a manner similar to that shown on the Mead plan. The revised esti-

mate of the Railroad Company provides for two roadway openings having clear widths of 20 feet and two sidewalk openings having clear widths of 9 feet, but it is not stated where these dimensions occur. The cost of this project is estimated to be $205,184.70, including the Camp Lane diversion, which is exclusive of all property and collateral damages except for the property actually needed for the construction of the new highway. The grade approaches to this crossing are 3.29% on the north side of the railroad and 1.10% on the south side. Drainage is provided and re-construction of the present drain, where it crosses the re-constructed highway is indicated. Under this plan no detour is necessary during the construction of the new work but when the present grade crossings are vacated the owners of land adjacent to the present highway, between the ends of the proposed diversion, will be left in a cul-de-sac. Damages accruing to such owners must be added to the estimate of the Railroad Company which must materially decrease the difference in cost of the two plans. Decided objection was made by the representatives of the municipalities and residents in the vicinity of the crossing to any plan which would divert the highway from its present tangent location.

The State has defined its policy concerning the building of the highway in no uncertain terms; Chapter 107, P. L. 1918, among other things, states: "All sharp turns and angles should be eliminated wherever practicable," and the Highway Department is working to this end. It appears to the Board that the introduction of curves, even though they be no sharper than six degrees, are unnecessary in this instance and are in direct opposition to the State's policy of eliminating curvature on highways wherever practicable, even though maintenance of the highway on tangent would increase the cost of elimination. The Board finds, therefore, against the adoption of the Railroad plan.

In both plans a pier about 5 feet wide at the street level, located in the center of the highway is proposed. The elimination of this pier will very materially increase the cost of the birdge and railroad maintenance. At many places in the State such piers have been built as one of the necessities of railroad construction and they have not been proven dangerous nor an impediment to travel on the highway. Another State Highway is proposed to cross State Highway Route No. 16 and the Lehigh Valley Railroad at this point. Because of its importance, the construction is considered imminent. Its completion will increase the highway traffic passing beneath this bridge. The necessity for sidewalks is now evident and will increase with the development of the community. The Board, therefore, is of the opinion that no bridge should be constructed of less width than the 66 foot right-of-way being acquired by the State Highway Department, that the use of the center pier in this location is a necessity, that two highways not less than 20 feet wide measured between curb lines should be provided and further provision should be made for the construction of sidewalks.

Considerable objection developed concerning the point where the relocated Camp Lane Road is proposed to join the existing Camp Lane Road. A decided preference was shown for the location of the east end of the proposed diversion at the elbow of the present Camp Lane Road located about 240 feet south of the center line of the railroad. A center line has been drawn in red on the Mead plan indicating this change of location and is marked "Proposed center line of re-located Camp Lane." The plan which has been developed is shown on two sheets entitled "Scheme 'H. P.' Board of Public Utility Commissioners, Division of Bridges & Grade Crossings, Survey in Vicinity of Royce Valley Station—L. V. R. R.,

Scale 1" equals 50', November 20, 1926," and Profile accompanying its marked "Scheme 'H. P.' Profile on Center Line of State Highway Route No. 16, Section 5A, traced from N. J. State Highway Map, Sheet 11/31," which plan, with the relocation of Camp Lane as shown by red center line, the Board finds is a proper plan for the elimination of the crossings and hereby approves it.

The estimated time required for the consummation of this work is one year after starting and the time required for the relocation of Camp Lane is two months, which latter time is included in the former. The Board concludes, therefore, that this work should be started by the first of June, 1927, and be completed by the first of June, 1928.

No Street Railway Company uses either of the crossings involved.

An Order will issue in accordance with the conclusions reached herein.

Dated April 26th, 1927.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

By

(SEAL.) (Signed) JOS. F. AUTENRIETH,
President.

Attest:

(Signed) ALFRED N. BARBER,
Secretary.

I HEREBY CERTIFY the foregoing to be a true copy of a decision rendered by the Board of Public Utility Commissioners and ordered filed by said Board.

Secretary.

LEHIGH VALLEY R

Analysis of Alignment of S
Township Line in Morris
Montgomery Tow

Location of Section	Highway Sec.	Section Begins at Station	Section Ends at Station	Length of Sectio	
				Tangents	Curves
Morris Twp. Line to Passaic River	6	116+03.31	262+10.40	7340.16	7266.93
Passaic River to Bernardsville	6A	0+67.20	116+03.31	8080.24	3455.87
Bernardsville to Mine Brook	1	108+17.00	234+50.80	6933.04	5700.76
Mine Brook to Bedminster	2	233+71.00	366+50.00	8131.43	5147.57
Bedminster to Pluckemin	3	366+50.00	494+00.00	7432.72	5317.28
Pluckemin to Somerville	4	494+00.00	783+07.91	22735.51	6172.40
Somerville	5H	0+00.00	32+50.00	3250.00	0.00
Somerville to South Somerville	5A	32+50.00	139+00.00	9361.68	1288.32
South Somerville to Weads Tavern	5	139+00.00	285+53.73	11378.91	3274.82
Weads Tavern to Harlingen	9	285+53.73	485+91.04	15251.11	4786.20
Harlingen to Lahaw's Corner	8	0+00.00	23+00.45	1733.80	566.65
		TOTALS	Lin. Ft.	101628.60	42976.80
			Miles	19.24	8.14

* 5.61% of Total length.

"D."

Office of the Chief Engineer,
New York, February 4, 1927.

AD—N. J. & L. DIVISION.

hway Route #16 between Morris
, N. J. and Labaw's Corner, in
omerset County, N. J.

% Length on Curves	Total No. Curves	Cvs. exc. 6°	Location of Curves exceeding 6°				
			Station to Station		Radius	Degree	Length
			148 + 79.28	151 + 42.02	819.02	7° 0'	262.74
			186 + 37.01	190 + 58.37	603.80	9°30'	421.36
			239 + 66.27	242 + 45.44	819.02	7° 0'	279.17
49.74%	24	4	250 + 81.89	254 + 56.25	881.95	6°30'	374.36
			2 + 07.77	2 + 87.75	716.78	8° 0'	79.98
			5 + 40.24	6 + 83.72	130.25	44°56'	143.48
29.95%	10	3	12 + 33.44	14 + 10.48	573.69	10° 0'	177.04
45.12%	14	1	162 + 09.85	165 + 21.80	338.27	17° 0'	211.95
			334 + 76.19	337 + 68.30	716.78	8° 0'	282.11
38.76%	16	2	364 + 83.96	366 + 48.91	137.89	42°42'	164.95
			461 + 60.42	464 + 65.61	674.69	8°30'	305.18
41.70%	14	2	492 + 15.51	494 + 00.00	881.95	6°30'	184.49
			494 + 00.00	494 + 43.83	881.95	6°30'	43.83
			496 + 30.04	499 + 42.35	614.56	9°20'	312.31
			728 + 37.53	732 + 79.92	881.95	6°30'	642.39
37.14%	24	3	740 + 94.97	745 + 36.86	573.69	10° 0'	441.89
0.00%	0	0					
12.09%	2	0					
22.24%	6	1	225 + 58.59	233 + 55.90	764.49	7°30'	797.01
			407 + 99.43	411 + 54.75	660.80	8°40'	355.32
23.87%	12	2	411 + 54.75	413 + 75.40	176.59	32°26'	220.65
24.63%	1	0					
29.73%	134	18				Lin. Ft.	5700.21°
						Miles	1.08°

Cvs. AA. to Sta. 156 + 63.37, Sept. 5th, Length 4941.66 ft.

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Exhibit "C."

(Page 15.)

Exhibit "E."

Copied from the Route Book of the New Jersey State Highway Commission.

VOLUME 1.

Authorized February, 1921

ROUTE 16—COUNTY LINE TO HARLINGEN. HARLINGEN TO SOMERVILLE. SOMERVILLE TO COUNTY LINE.

August 3, 1920.

To the Board of Chosen Freeholders,
County of Somerset,
Somerville, New Jersey.

Gentlemen:

In accordance with the provisions contained in Article 3, Chapter 14, Laws of 1917, as amended in Chapter 104, Laws of 1920, whereby the State Highway Commission may, by resolution, take over as a State Highway any route, routes, or part thereof, of those highways designated by the Act to be taken over as State Highways, you and through you, the County of Somerset is respectfully advised that, effective May 1, 1920, the State Highway Commission will, in the name of the State of New Jersey, take over as a State Highway and thereafter be responsible for the improvement and maintenance of the portion or portions of the road lying within the boundaries of the County of Somerset known as the North and South Road, beginning at the Morris County line at Van Doren's Mills and running thence in a general south westerly and southerly direction to the Mercer County Line, excepting a portion of the road through the Borough of Somerville, taken from the Borough of Somerville, and a portion of the road

nown as Harlingen Cutoff, taken from the Township of Montgomery, the portion taken from the County of Somerset being more specifically described as follows:

First Parcel. Beginning at a point in the road leading rom Bernardsville to Morristown by Van Doren's Mills, aid road now being known as the North and South Road, said point being at the center of the bridge over the Passaic River near Van Doren's Mills, said point being also n the line between the County of Morris on the north-east nd the County of Somerset on the south-west, running hence along the center line of the said North and South Road in a general south-westerly direction, passing hrough Bernardsville, Mine Brook and Far Hills in the Townships of Bernards and Bedminster, a distance of even (7.0+ —) miles more or less, to the center line of a ross road at Bedminister; thence (2) turning to the left ith an angle of about seventy degrees and running in a general southerly direction along the center line of the Pluckamin Road, now known as the North and South Road, through the Townships of Bedminster and Bridgeater, a distance of (7.0+ —) miles more or less, to an gle point in said road; thence (3) still along the center ine of the said North and South Road in a general southasterly direction, through the Township of Bridgewater, distance of twenty-three hundredths (0.23+ —) of a ile more or less to a point in the line between the Townhip of Bridgewater on the North and the Borough of Somrville on the south, said point being also in the center ine of Mountain Avenue and at the center line of the ridge over "Town Line Brook;" thence (4) along the enter line of Mountain Avenue, in the Borough of Somerille, in a south westerly direction, a distance of twenty-ine hundredths (0.29+ —) of a mile more or less, to he southerly line of the bridge over Peter's Brook, said oint being the beginning of the parcel to be acquired

from the Borough of Somerville; excepting Section 1 fro Bernardsville to Mine Brook (2.392 mi.).

Together with

SECOND PARCEL. Beginning at the center line of Sou Bridge Street, in the Borough of Somerville, at the south erly track of the Central Railroad of New Jersey at th ending of Parcel #2, taken over from the Borough Somerville, thence (1) along the center line of Brid Street through the Borough of Somerville and along th center line of the South Somerville Road, now known a part of the North and South Road, Route #16, throug Hillsborough Township in a general southerly and sout westerly direction, a distance of two and ninety-one on hundredths (2.91+ —) miles more or less to the bridg over a branch of Royce's Brook near Liberty Schoolhouse thence (2) along the center line of the road leading fro Liberty Schoolhouse to Conover's Corner, which is a par of the road now known as the North and South Road, i a general southerly, westerly and then southerly directi through Hillsborough Township, passing by Woods Ta ern, a distance of three and thirty-eight hundredth (3.38+ —) miles more or less to the center line of a roa on the right at Conover's Corner leading to Flagtow thence (3) along the center line of the road leading fro Conover's Corner to Harlingen, said road being part what is now known as the North and South Road, in a ge eral south-westerly direction, running through Hillsbo ough and Montgomery Townships and passing throug Belle Meade over the tracks of the Delaware and Bou Brook Railroad Company a distance of two and nine three hundreds (2.93+ —) miles more or less to a point the intersection of the cross-roads at Harlingen where County Road turns on the cross-road to the left, said po being the beginning of a parcel of this road to be tak over from the Township of Montgomery;

Together with

THIRD PARCEL, all through Montgomery Township.

Beginning at a point in the cross-roads at La Baw's Corners, in the center line of the road leading from Harlingen to Rocky Hill, now known as part of the North and South Road, said point being the ending of the portion of the road to be taken over from the Township of Montgomery, thence (1) along the said road leading from Harlingen to Rocky Hill, in a general southerly direction, a distance of three hundred and fifty-five thousandths (0.355+ —) of a mile more or less to an angle point in said road; thence (2) turning to the left, and still along said road leading from Harlingen to Rocky Hill, in a southeasterly direction, a distance of seven hundred sixty-six thousandths (0.766+ —) of a mile more or less to an angle point in said road, west of "Bridge Point"; thence (3) still along the center line of said road leading from Harlingen to Rocky Hill, in a general southerly and southwesterly direction, passing through Bedensville, a distance of two and twelve hundredths (2.12+ —) miles more or less to a cross-road at Bolmer's Corners about three-quarters ($0.^{3}_{4}$+ —) of a mile westerly from Rocky Hill; thence (4) along the road leading from Bolmer's Corners to Princeton, in a general southerly direction, a distance of nine-tenths (0.9+ —) of a mile more or less to the line between Somerset County on the north and Mercer County on the south, at the cross-roads leading from Rocky Hill to Pennington.

It being intended to take over the width between right-of-way lines (the minimum width being thirty-three (33) feet, the maximum width being sixty-six (66) feet excepting through the Borough of Somerville, where it is intended to take over only between curb lines.

The State reserves the right under Chapter 220 of the Laws of 1919, to abandon at some future date, that por-

tion of the present traveled roadway, the discontinuance of which it may deem necessary for the improvement of the existing line and grade, and the same will revert to the municipal body now having jurisdiction over the same.

It is requested that you file with this Department within thirty (30) days any agreements or copies of franchises you may have with any public utility, or other company, firm, individual or corporation, affecting the construction, maintenance or use of the above-described road.

Yours very truly,

W. J. KIRBY,
Chairman, pro tempore.

Resolution of State Highway Commission,
Passed April 13, 1920.
Minute Book, Page 781.
Pages 707, 708,
709 and 710
certified to be
a true copy of
original notice.

A. LEE GROVER
Secretary.

Minutes of State Highway Commission.

MINUTES OF MEETING—APRIL 13, 1920.

"The Chairman stated that this adjourned meeting was called for the purpose of taking action on the matter of State Highway Route No. 16, created under Senate Bill No. 252, just signed by Governor Edwards. Col. Kuser stated that he presumed the first action to be taken on this matter would be the taking over of the route as a part of the State Highway System. The Chairman stated that this would be first in order.

Mr. Kuser moved the adoption of the following resolution:

> RESOLVED, that State Highway Route No. 16, from Morristown to Trenton, via Van Doren's Mills, Bernardsville, Far Hills, Bedminster, Pluckamin, Somerville, South Somerville, Belle Mead and Harlingen, be taken over, effective May 1st, 1902, as a part of the State Highway System, for future improvement, maintenance and repair by the State."

The Secretary advised that a delegation from the Board of Freeholders of Somerset County had called on Mr. Thompson on Saturday last regarding this matter. Mr. Reed, Assistant State Highway Engineer, raised the question as to whether the Commission could take the road over without holding a public hearing on the matter. The Chairman stated that the requirement of law was that 'When in its discretion, it shall see fit so to do,' the Commission may hold hearings. He further stated that this requirement seemed designed to cover cases where alternate routes were possible and in order to learn the sentiment existing as to routes to be followed and, inasmuch as there was no choice of routes in this case, a hearing would not be necessary.

Following a discussion, Mr. Haverstick seconded Col. Kuser's motion, and upon vote same was unanimously adopted."

MINUTES OF MEETING—JANUARY 10th, 1923.

"The Secretary presented a communication together with a notice from the Public Utility Commission ordering the elimination of grade crossing at Bridge St., Somerville, on State Highway #16. On motion by Col. Wittemore, seconded by Mr. Seabrook, the communication with the accompanying order was received and the Engineer-

ing Department was directed to open up negotiations w
the Railway Company looking toward the elimination
the grade crossing."

MINUTES OF MEETING—JULY 31, 1923.

"The State Highway Engineer presented a report
connection with the proposed elimination of grade cro
ing on Route #16 at South Somerville at the tracks of t
Lehigh Valley Railroad Company. He informed the Co
mission that the estimated cost of the entire structu
would be $87,000.00, toward which the Lehigh Valley R.
Co. is willing to contribute $40,000. On motion by
Stewart, seconded by Mr. Jelin, the State Highway E
gineer was directed to make a thorough investigation of t
matter of elimination of grade crossing on Route #16
South Somerville and to present a report for considerat
when all the Commissioners are present."

MINUTES OF MEETING—MARCH 11, 1924.

"State Highway Engineer Sloan presented for the co
sideration of the Commission alternate schemes for gra
crossing elimination in South Somerville, in which
recommended the adoption of plan "C" at a total estima
cost of $109,024.00, involving a structure with a cen
pier in the highway, leaving 18' of the roadway on ea
side of the pier, the railroad company to share in the co
of this improvement to the extent of $40,000.00. On m
tion by Mr. Kiddle, seconded by Mr. Jelin, the State Hig
way Commission approved plan "C" for the elimination
Lehigh Valley Railroad crossing at South Somerville, a
directed that this elimination be proceeded with and th
$40,000.00 be accepted from the Lehigh Valley Railro
Company as its proportionate share of the cost."

Exhibit E—Minutes of Meetings.

MINUTES OF MEETING—APRIL 22, 1926.

"The Secretary presented a resolution from the Somerset County Board of Freeholders disapproving of the proposed East Route under the Lehigh Valley Railroad at South Somerville and expressing their approval of the present line as followed by Route #16 at this point. In this connection Mr. Kidde moved that the Somerset County Board of Freeholders be advised that the action in adopting this new line had already been taken by the Commission on account of the considerable saving that would be affected thereby, and the further fact that the curve involved was only a six degree curve which is not considered serious by the State Highway Commission, and also the fact that a much shorter under pass and speedier construction would be accomplished by means of the new line as adopted."

MINUTES OF MEETING—JUNE 3, 1926.

"The Secretary presented a communication from Senator Clarence E. Case of Somerset County requesting an opportunity to appear before the Commission with reference to the construction of Route #16 near the Lehigh Valley Railroad Bridge at South Somerville. The Secretary informed the Commission that Senator Case was present and inquired whether the Commission would hear him at this time. On motion, duly seconded, a hearing was granted. Senator Case appeared before the Commission and advised that a number of residents of South Somerville at the location of the proposed Lehigh Valley Railroad Crossing elimination were exercised over the fact that the Commission proposed to place a curve in the roadway leading to the new undergrade crossing, instead of continuing the highway in a straight line as before. He also stated that the members of the Board of Freeholders

of Somerset County were opposed to the proposition as undertaken by the Commission. He asked whether it would be possible for the Commission to grant a hearing to the residents of Somerset County who were interested in the proposition at Somerville, in the near future. After explanation by the State Highway Engineer, Commissioner Stewart moved that a public hearing be held on Wednesday, June 11th, at 3:00 P. M., at the Court House in Somerville. This was seconded by Mr. Jelin and adopted."

MINUTES OF MEETING—JUNE 18TH, 1924.

"On the matter of the meeting in Somerville, Commissioner Jelin advised that Senator Case appeared as representative of a number of residents of that vicinity, and together with members of the Board of Freeholders, protested against the alignment for the Lehigh Valley Railroad Crossing Elimination on Route #16 at South Somerville. He advised that it appeared to be the feeling of the residents that the railway company was to be benefited under the plan proposed by the State Highway Commission. This impression was corrected with the advice that the Lehigh Valley Railway Company is to contribute $40,000.00 toward the improvement in whichever manner the same was effected. It was also explained to the residents that if a straight line was adopted for the Route, there would be an additional 42' of covered roadway over that proposed. In addition to that it was pointed out that there are other points on this route where the curvature is 6° or more; he stated that the entire recommendation of the residents and freeholders was to the effect that Somerset County was entitled to the consideration of the State Highway Commission for the building of straight highways, even though there was involved in this case an expenditure of $40,000.00 by the State. Commissioner

elin advised that he had no recommendation to make, but e stated that at the conclusion of the meeting it ap- eared that all of the questions in the minds of the local esidents had been cleared up."

MINUTES OF MEETING—JUNE 24, 1924.

"The Secretary informed the Commission that at the st meeting no definite action was taken concerning the ehigh Valley Railroad crossing at South Somerville, due the absence of Commissioner Stewart, and he inquired ether any further action would be taken. Commissioner tewart reported that pursuant to the request of Senator ase a public hearing was held on the question of change plans for the elimination of Lehigh Valley Railroad rossing at South Somerville and no additional facts not eady before the State Highway Engineer or State High- ay Department were produced which would lead the High- ay Commission to alter its opinion in regard to the ad- sability of the change as contemplated in the original lans, and, therefore, he would move that the plans as awn, not only from an engineer's standpoint, but be- ause of a saving of money and because they are already repared, be proceeded with and a copy of the action of is meeting be forwarded to Senator Case. This was econded by Mr. Kidde and adopted."

MINUTES OF MEETING—MARCH 17, 1925.

"The Secretary informed the Commission that a dele- ation of citizens and officials from Somerset County were resent for a hearing, as granted by the Commission at the st meeting, on the matter of the Grade Crossing Elimina- n at South Somerville on Route #16. On motion, duly econded, a hearing was granted.

"Senator Clarence E. Case, of Somerset County, act
as Chairman of the delegation and advised that they h
received information that the Commission was consider
changing the line of the existing Route #16 at Roy
Valley Station, by causing the roadway to turn off ju
above the grade crossing existing on the Lehigh Vall
Railroad at this point and then coming back to the ro
way about two hundred feet below. This turn off wo
cause a bend in the roadway which he stated was ve
objectionable to the entire County of Somerset, since it w
entirely feasible to eliminate the crossing on a straig
line. He advised the Commission that following adv
from the Commission that the reasons for the turn off w
the facts that the drainage would be better on the n
line and also that the costs would be about $40,000 in e
cess of a straight line, the local authorities had employ
Thomas J. Wasser, former State Highway Engineer, a
consulting engineer, to make an independent report. H
asked Mr. Woodruff, Clerk of the Board, to read this r
port.

Mr. Woodruff proceeded to read from Mr. Wasse
report, in which it was stated that field data taken wo
show that the drainage could be taken care of properly
the straight line without raising the railroad tracks, a
that the streams have sufficient fall to take care of t
drainage from either location; also, that the part of t
present highway affected is about 124 feet shorter than t
distance involved in the proposed relocation, and in or
to protect the traveling public, in view of the propo
type of construction involving a center row of columns,
would be necessary to maintain a lighted cautionary sig
at all times. Mr. Wasser called attention to the fact th
the Public Utility Commission has within its power t
right to compel the elimination of this crossing by t
Railroad Company at the entire expense of the Compa

and it should be possible to have the elimination accomplished without any further cost to the State than already agreed upon.

Senator Case advised the Commission that there would be no saving in detour expenses while such work was under way. He called upon Mr. Hugh K. Gaston, representing the Somerset County Good Roads Association and the Township of Hillsboro, who stated that all the people of the County felt it would be a mistake for the Commission to change the line of Route #16 from that existing. Senator Case then called upon Mr. Brown, Mr. Wright and other property owners who admitted selling property to the State for the improvement of Route #16, but stated that it was never intended that the line of the road should change. Judge Dungan addressed the Commission as one interested in the matter and stated that he believed the State Highway Commission should not allow a matter of dollars to stand in the way of a straight highway. He told of a negligence case coming before his court where an accident had resulted in the death of a child where an auto had not been able to see beyond a row of columns such as proposed in the structure for this crossing. He said that since they were on a skew, they would present a solid wall to those approaching at an angle.

Mayor Flockhart, of Somerville, advised that the relocation would add 250 feet for a return trip which would cost the traveling public considerably more than the increase in cost, when considered over a period of years.

Mr. Remsen, Director of the Somerset County Board of Freeholders, advised that the Board was in receipt of so many complaints on the attitude of the State Highway Commission toward this improvement that it felt that it was necessary to call the matter again to the attention of the Commission.

Mr. Woolston of the Board of Freeholders stated that he believed the co-operation given to the State by Somerset County in paying interest charges on reimbursement work would justify the State in expending the extra money needed to put the crossing elimination on a straight line.

Senator Case stated that there were present about 50 residents of Somerset County, and the sentiment in the County was unanimous for the straight line.

Chairman Scott then concluded the meeting by advising that he felt sure the Commission was impressed with the nature of this meeting and would give the matter very careful consideration before reaching a final decision."

MINUTES OF MEETING—MARCH 24, 1925.

"The Secretary presented a communication from Hon. C. E. Case of Somerset County with further reference to the hearing given the Somerset County delegation, which protested against the realignment of the Grade Crossing at South Somerville, and recommending that the existing straight alignment be followed.

Senator Case advised that while it was claimed by the Commission that there would be a saving on the new location, still the economic loss, resulting from the return to the County of the unused dead ends on the existing line, would, over a period of years show a loss rather than a profit on the new line.

Mr. Jelin stated that he had given this matter very serious thought since the last meeting and it was his belief that an application should be made to the Public Utility Commission looking toward the Railroad Company paying for the elimination of the grade crossing, and that the State Highway Commission should adopt the line on its present alignment rather than put a curve in the road.

Commissioner Kidde stated that he believed this question would result in holding up the program on grade crossing elimination, which had been so successful in the past, because it would prevent the co-operation between the State and the railroads as before. Commissioner Stewart stated that he believed that in view of the recent decision from the Supreme Court of the United States to the effect that Public Utility Commissions can direct railroad companies to eliminate grade crossings, it is almost mandatory upon the State Highway Commission to adopt such a motion before proceeding into any negotiations with railroad companies.

Commissioner Jelin stated that there was the further reason that the public opinion in this particular locality was unanimous with regard to this condition, and he moved that the State Highway Engineer be instructed to take application to the Public Utility Commission for an order requiring the Lehigh Valley Railroad Company to eliminate the grade crossing on Route #16, South Somerville, at Royce Valley Station, and further that there should be eliminated from the contract for paving the amount of work on each side sufficient to accommodate the elimination of the railroad crossing. This was seconded by Mr. Stewart and adopted."

I, A. Lee Grover, Secretary of the State Highway Commission, hereby certify that the foregoing is a true and complete copy of the entire record of the minutes of the State Highway Commission relative to State Highway Route No. 16, in so far as they relate to any decisive actions affecting the proposed elimination of grade crossing where State Highway Route No. 16 crosses the Lehigh Valley Railroad at Royce's Valley in the Township of Hillsborough, County of Somerset, and with relation to the negotiations with the Lehigh Valley Railroad Com-

pany with reference to the plan and terms and conditions for the elimination of said grade crossing.

Witness my hand and seal this 21st day of May, 1927.

A. LEE GROVER
Secretary, State Highway Commission.

(L. S.)

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FOR
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Part of Exhibit "F."

Blue Print No. 3553.

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Exhibit "G."

(Page 37.)

Exhibit "I."

Lehigh Valley Railroad,
Office of Chief Engineer,
New York, Feb. 3, 1927.

ROYCE VALLEY (SOUTH SOMERVILLE)
NEW JERSEY

Estimated Cost of Elimination of Grade Crossing of State Highway No. 16 in Accordance with Scheme "C" as Shown on Plan WHR 192 dated August 15, 1924 (R. R. Co. Exhibit No. 1—Hearing before Board of Public Utility Commissioners at Newark on Dec. 16, 1926).

GRADING		
9000 cubic yards highway excavation (exclusive of grading under bridge) including disposal @ $2.50	$22,500.00	
1200 cubic yards grading under bridge @ $3.25	3,900.00	
Engineering and incidentals—10%	2,640.00	
Total for Grading		$29,040.00
BRIDGE—4-Track, 2-Span, Reinforced Concrete Railroad Bridge. Clear Width of Roadway Openings 18'0". No Sidewalks. Minimum vertical clearance 14'0"		
Temporary support for tracks	14,022.00	
Substructure	29,970.00	
Superstructure	18,760.00	
Track changes account bridge construction	6,500.00	
Engineering and incidentals—10%	6,925.20	
Total for Bridge		76,177.20

Exhibit I—Mr. Johnston's Estimate of Cost.

	DRAINAGE OF UNDERPASS		
	400 cu. yds. trench excavation in rock, including backfill, @ $5.00	2,000.00	
	50 cu. yds. Trench excavation in earth, including backfill, @ $1.50	75.00	
	21 Tons C. I. pipe, Class "A," in place @ $85.00	1,785.00	
	384 lin. ft. reinforced concrete pipe 30"x33½", in place @ $6.00	2,304.00	
10	3 manholes @ $100.00	300.00	
	4 catch basins @ $50.00	200.00	
	800 cu. yds. excavation, unclassified, account of deepening & straightening drainage ditch @ $3.50	2,800.00	
	Grubbing and clearing course of drainage ditch	500.00	
	Engineering and incidentals 10%	996.40	
	Total for Drainage		10,960.4
	CULVERTS		
	Reinforced concrete pipe culvert 65"x60" at Sta. 127+85+— — 72 lin. ft. complete, including excavation and headwalls, @ $25.00	1,800.00	
	Extension to present culvert 4'x5' at Sta. 138+30, including deepening and straightening brook	2,000.00	
20	Engineering and incidentals—10%	380.00	
	Total for Culverts		4,180.0
	MISCELLANEOUS		
	Changes in depot platform a/c change in grade of tracks	500.00	
	Surfacing sidewalks under and near bridge with cinders	400.00	
	Removal of present crossing gates	200.00	
	125 lin. ft. cable guide railing @ $1.25	156.25	
	Changes in depot grounds including steps at bridge	2,000.00	
	Engineering and incidentals—10%	325.62	
30	Total for Miscellaneous		3,581.8
	LAND AND DAMAGES		1,000.0
	INTEREST DURING CONSTRUCTION		2,750.0
	TOTAL—Exclusive of Highway Paving		$128,689.4
	HIGHWAY PAVING AND CURBING—		
	Sta. 121+00 to Sta. 132+75, 1175 Lin. ft.		
	4000 sq. yds. concrete pavement @ $3.25	$13,000.00	
	1480 lin. ft. concrete curbing @ 1.25	1,850.00	
	Engineering and incidentals—10%	1,485.00	16,335.0
	GRAND TOTAL		$145,024.4

Exhibit I—Mr. Johnston's Estimate of Cost.

SUMMARY

Grading	$29,040.00	
Bridge	76,177.20	
Drainage of Underpass	10,960.40	
Culverts	4,180.00	
Miscellaneous	3,581.87	
Land and Damages	1,000.00	
Interest during construction	3,750.00	$128,689.47
Highway paving and curbing		16,335.00
GRAND TOTAL		$145,024.47

* Note: If Bridge is constructed to provide roadway opening having clear widths of 20'0" and two sidewalk openings having clear widths of 9'0", the total estimate will be increased $52,500. making total cost of project $197,524.47.

ROYCE VALLEY (SOUTH SOMERVILLE) NEW JERSEY

Estimated Cost of Proposed Relocation of Camp Lane Road in Accordance with Plan WHR 197 dated November 12, 1924 (R. R. Co. Exhibit No. 2—Hearing before Board of Public Utility Commissioners at Newark 12-16-26).

COST OF PROPERTY		
0.3+ — acres L. V. R. R. property @ $400.00	$120.00	
0.8+ — " additional property @ 400.00	320.00	
Total for Land		$440.00
GRADING		
1000 cubic yards @ 2.00	2,000.00	
Engineering and incidentals—15%	300.00	
Total for Grading		2,300.00
PAVING		
3253 sq. yds. rolled macadam—16' wide @ 1.30	4,228.90	
Engineering and incidentals—15%	634.33	
Total for Paving		4,863.23
INTEREST DURING CONSTRUCTION		57.00
TOTAL		7,660.23

Exhibit "J."

STATE OF NEW JERSEY

BOARD OF PUBLIC UTILITY COMMISSIONERS
DIVISION OF BRIDGES AND GRADE CROSSINGS

NEWARK

LEHIGH VALLEY RAILROAD STATE HIGHWAY ROUTE No. 16
ROYCE VALLEY

Estimate for Grade Crossing Elimination on Present Location.

STATE HIGHWAY PROFILE—SKEW 29°30'—E60 LOADING
LIMIT FOR ESTIMATE—STATIONS 121 + 00 TO 131 + 50 ON HIGHWAY

SCHEME "HP"

Bridge:		
Temporary Supports for Four Tracks		
Four track trestle 260' long, each track, @ $45 PLF	$46,800	
Engineering, 10%	4,860	
	51,480	
Credit, 1/3 cost of trestle	15,600	$35,880
Substructure:		
Excavation, Stations 125 + 33 to 127 + 33, hand work in shale, including backfill, 12650 CY @ $4	$50,600	
Additional trench excavation for center pier and 10 pits for piers on curb line, including backfill 130 C. Y. @ $4	520	
Concrete abutments; base, 408 C. Y. @ $15	6,120	
wall, 886 C. Y. @ $15	13,290	
Center pier; base, 108 C. Y. @ $15	1,620	
shaft, 159 C. Y. @ $15	2,390	
Reinforcing steel, 25,000 lbs. @ $ 05	1,250	
10 piers, 55 C. Y. @ $15	820	
Incasement, 10 C. Y. @ $15	150	
Flagman and watchman	4,000	
	80,760	
Engineering, 10%	8,080	88,840

Exhibit J—Mr. Mead's Estimate of Cost.

Superstructure: 4 track, 4 span, Thru Plate Girder bridge, 14' minimum vertical clearance, 2 roadways, 20' wide between curbs, and 2 sidewalks 9' wide. 66' between abutments.			
Structural steel in place, 1,093,600 lbs. @ $.0637	$69,700		
Waterproofing, 9150 s. f. @ $.35	3,200		
Protection 1000 s. y. @ $3.25	3,250		
Falsework for erection, 6 lines, double bents each 250' long	22,800		
Flagman and watchman	1,000		10
	99,950		
Engineering, 10%	9,990		
	109,940		
Credit on Falsework	14,700	$95,240	
Track Work:			
Raising track under traffic, 4 tracks, 1000' each, avg. 3" @ $16.0 PVF	$1,600		
Stone ballast, 500 C. Y. @ $1.75	880		
Track ties, 400 @ $2.00	800		
Taking up and relaying track twice, 300' each = 2400' @ $1	2,400		20
Flagman and watchman	1,000		
	$6,680		
Engineering, 10%	670	$7,350	
Culverts and Drainage:			
Excavation, shale, 420 C. Y. @ $4	1,680		
Culvert, concrete, 135 C. Y. @ $20	2,700		
Entrance channel 20 C. Y. @ $20	400		
Headwall, outlet end, 23 C. Y. @ $15	350		
Reinforcing steel, 13,500 lbs. @ $.05	680		
Catch basins under, 4 @ $50	200		
24" C. I. pipe in trench incl. backfill, 86 ft. @ $11.25 PLF	970		
36" V. C. pipe in trench incl. backfill, 125 ft. @ $12.75 PLF	1,600		30
30" V. C. pipe in trench incl. backfill, 165 ft. @ $10.87 PLF	1,800		
Catch basins and covers, 3 @ $100	300		
Ditch excavation, including clearing and grubbing, 1000 ft., 2000 C. Y. @ $2.50 C. Y.	5,000		
	$15,680		
Engineering, 10%	1,570	$17,250	

Exhibit J—Mr. Mead's Estimate of Cost.

Additional Work:

Excavation, Sta. 191+00 to 192+00 and Sta. 197+00 to 199+00, using C. Y. excluding backfill, contingent, @ $2.00 ..... $20,000

Walls, wing and retaining, outside of main abutments, 850 C. Y. @ $15 12,750

Chairway at Station 100

Station Changes, platforms due to track raise 500

Moving Mills Depot 500

Taking up and storing gates, sign and shanty 200

Removing shed and grade and storing angle 2,000

Sidewalk crossing under bridge 500

Land and damage 1,500

$37,550

Engineering, 10% 3,755 $41,305

Interest during Construction, 6% - 6 mos. 1,239 $42,544

Paving Highway, excluding property, Due grade, 5,000 C. Y. @ $0.25 ..... $1,250

Curb, 2,500 lin. ft. @ $1.25 3,125

4,375

Engineering, 10% 438 4,813

Total cost, Bridge and Approaches $47,357

CAMP LANE—DESCRIPTION

Cost of Property

0.65 Acres L. Y. M. H. property @ $400 ..... $260

1.10 Acres, additional property @ $400 ..... 440 $700

Grading @ 1.00 lin. ft.

670 C. Y. @ $2.00 ..... $1,340

Engineering, 10% 134 $1,474

Paving, $5.00 lin. ft.

4,500 S. Y. rolled macadam 18' wide @ $1.00 ..... $4,500

Engineering, 10% 450 $4,950

Culvert

60' Concrete box 5' wide x 6 high @ $30 PLF $1,800

Engineering, 10% 180 $1,980

$8,404

Interest during Construction, 6% - 6 months 60 $8,464

Exhibit K—Record of Laying Out State Highway No. 31.

ESTIMATE OF QUANTITIES

Temporary Supports for Four Trestles	$20,000	
Substructure	30,000	
Superstructure	50,000	
Track Work	1,000	
Grade and Drainage	17,000	
Additional Work	20,000	
Canal Dredge Construction, 21—4 months	8,000	$80,000
Dump and Parking Bridges		10,000
Bridge and Approaches		$90,000
Lake Lane—Including Culvert		10,000
GRAND TOTAL COST OF PROJECT		$210,000

Time now required for Bridge and Approaches—2 year
Time now required for Relocation of Camp Lane—2 months

Exhibit "K."

Record of Laying Out State Highway Route No. 31.

We, the subscribers, six of the surveyors of the highways in and for the County of Somerset from the townships of Bridgewater, Hillsborough and Montgomery, appointed by a rule of the inferior court of common pleas of and for the said County in the term of April last to take into consideration the propriety of laying a public road of two rods wide to begin on the north side of the road leading from Rocky Hill to Pennington directly opposite the road leading from Pennington by the lands of Uzer Hunt and Job Anderson to the said Pennington Road and terminating at or near the place where the road ruling from Hall's Tavern in Somerville strikes the river Raritan and likewise to vacate all such parts of the public highways laying or running in the route of the said proposed road and to relist the same according to our discretion. Having met according to the appointment of the said court at the house of the said Oliver Hunt on the

twentieth inst., having viewed and caused to be surveyed the different routes that have been shown to us and having heard the allegations of the parties and duly considered the same do agree to lay out a public highway of two rods wide. To begin at the Bloomburgh road thence running north nineteen degrees east one hundred and ten chains and seventy five links thence north seventy one degrees west twenty five links thence north nineteen degrees east five chains and eighty three links thence north seventy one degrees east five chains and eighty three links thence north seventy one degrees west one chain and twelve links thence north nineteen degrees east twenty eight chains and forty two links thence north thirty degrees and ten minutes west seven chains and thirty five links thence south two degrees west four chains and twenty five links thence crossing the line between Samuel Beckman and John D. W. Toolenek north fifteen degrees west three chains thence north seventy two degrees and thirty minutes west three chains and sixty nine links thence north twenty six degrees and fifty minutes west three chains and forty seven links thence north forty three degrees and forty five minutes west two chains and eighty five links thence north eleven degrees and thirty minutes east two chains and eighty four links thence north fifteen degrees west six chains and thirty two links thence crossing the said Toolenecks line north four degrees west five chains and twenty two links thence north twelve degrees and fifteen minutes west five chains and eighty links thence north forty five minutes east four chains to a white oak tree a corner of Col. John Van Dyke meadow thence north thirteen degrees west ten chains and seventy five links thence north two degrees and ten minutes west eight chains and eighty three links thence north fifty six degrees & thirty minutes east fifteen chains and ninety links thence north six degrees and fifty minutes east four chains and ninety two links thence

north forty one degrees west seven chains and sixty-one links to the middle of Poe's brook bridge thence north forty-nine degrees fifty minutes west six chains to the junction of the roads at the Harlington church thence north eighteen degrees and forty minutes east thirty-eight chains and sixty three links to the middle of the bridge over Johnsons brook thence north twenty-two degrees east three chains thence north twenty three degrees and thirty minutes east six chains and eighty-seven links thence north eight degrees and thirty minutes east six chains and forty links thence north thirteen degrees west six chains and twenty links thence north one degree and fifteen minutes west seven chains and thirty links thence north twenty-one degrees and fifty minutes west twelve chains and sixty three links to a white oak tree a corner of the purchase lot thence north twenty one degrees and thirty minutes east eighty one chains and ten links thence north forty three degrees and twenty minutes east seven chains and sixty five links north twenty one degrees and thirty minutes east eleven chains thence north nineteen degrees and fifty minutes east twelve chains and thirty six links thence north twenty eight degrees east seven chains and seven links thence north nineteen degrees west seven chains and twenty links thence north twenty nine degrees and forty minutes west five chains and thirty eight links thence north thirty eight degrees and forty minutes east seven chains and fifty links, thence north sixty three degrees and ten minutes west two chains and ten links thence north one degree and thirty minutes east eleven chains and fifty five links thence north forty one degrees and thirty minutes west two chains and fifty two links thence north five degrees east four chains and fifty six links thence north forty one degrees east seven chains and ninety five links thence north twenty two degrees and thirty minutes east three chains and fifteen links thence north twenty

minutes east seventeen chains and thirty links to the Am
well road thence north fifty degrees and thirty minute
east eight chains and ninety links thence north sixty-eigh
degrees and fifty minutes east two chains and ninety link
thence south eighty-three degrees east eight chains an
ninety links thence north forty-six degrees and thirty mi
utes east thirteen chains and ninety links thence nort
fifty-five degrees and twenty minutes east five chains an
thirty-five links thence south seventy-one degrees an
fifty minutes east thirty-two chains and sixty links (th
last six courses being on the Amwell road) thence nort
twenty-four degrees and forty-five minutes east fifte
chains and twenty links to a white oak trees thence nort
thirty-six degrees and fifteen minutes east five chains an
fifty-eight links thence north forty-five degrees and thir
minutes east eight chains and twenty links thence nort
forty-six degrees and thirty minutes east seven chain
and twenty-seven links to the mouth of Doctor Van Ke
veers lane thence along the same north eight degrees an
thirty minutes east sixty-three chains and ten links then
north eleven degrees and forty minutes east five chai
and seventy-five links thence north fifty-eight degrees an
thirty minutes east twelve chains and sixty-two link
thence north seventeen degrees and forty minutes ea
forty-six chains and eighty links to a turn in the roa
being John Van Zants corner thence along the lane nort
forty-three degrees east seventy-nine chains and thre
links to a pin oak tree thence north twenty-two degree
and forty-five minutes east twelve chains and forty link
to Peter A. Dumonts line thence along the same nort
four degrees and thirty minutes west seventy-one chai
and seventy-five links to the Raritan Road thence nort
fifteen degrees east eleven chains and twenty-five link
to the bank of the Raritan River, opposite to the mou
of the lane leading from Halls Tavern in Somerville t

said river thence crossing the same to the mouth of the said lane which said road we have caused to be marked at proper distances in the middle thereof and which we do hereby order and direct to be opened for public use on or before the first day of April next a map of the same being hereunto annexed; and we do hereby vacate such parts of former roads upon which the present road is laid.

In witness whereof we have hereunto set our hands the 25th day of May, 1811.

PETER T. ELMENDORF
ANDREW A. TEN EYCK
Bridgewater

GARRET QUICK
Hillsborough

GILBT B. TAYLOR
PAUL AMERMAN
Montgomery

PETER MONFORT

Recorded Sept. 7th, 1811,
by Sam'l Swan, Clk.

STATE OF NEW JERSEY, }
COUNTY OF SOMERSET, } ss.:

I, JOHN A. MAXWELL, Clerk of said County, Do Hereby Certify the foregoing to be a true and correct copy of a certain road record, dated May 25th, A. D. 1811, as the same is recorded in my office on the 7th day of September, 1811, in Road Book B, on pages 31, &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County, this 6th day of June, A. D. 1927.

JOHN A. MAXWELL,
County Clerk.

(Seal)

Road Record.

CERTIFIED COPY

Dated May 25th, 1811.

Received in the County Clerks Office of Somerset County on the 7th day of September, A. D. 1811, and recorded in Road Book B on pages 31 &c.

SAMUEL SWAN,
Clerk.

Certificate of U. S. District Court Clerk.

DISTRICT COURT OF THE UNITED STATES OF AMERICA.

District of New Jersey.

I, George T. Cranmer, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be the record on Appeal in the above stated cause, record in two Volumes, Vol. I containing Appeal Papers, Pleadings, Affidavits, Opinions, Vol. II containing Exhibits.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District, this Twenty-second day of November, nineteen hundred and twenty-seven.

GEORGE T. CRANMER,
Clerk, District Court, U. S.

(SEAL.)

By

L. M. Zarp,
Deputy.

[fols. 115a & 115] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The Answer of the defendants, Board of Public Utility Commissioners, Joseph F. Autenrieth, Frederick W. Gnichtel and Charles Browne, constituting said Board, to the Bill of Complaint of the Lehigh Valley Railroad Company.

I

These defendants answering say that:

1. They admit Paragraphs 1, 2, 3, 4 and 5 of the Bill of Complaint, except that they say that the copy of the Order of the defendant Board of Public Utility Commissioners annexed to the Bill of Complaint does not set forth the whole of said order, but that a part of said Order, as appears therefrom, consists of a separate document known as the decision bearing even date with said Order, and a copy of which is not annexed to the Bill of Complaint.

2. They admit that prior to the institution of the proceedings by the defendant Board, mentioned in said Bill, certain negotiations had been conducted between the plaintiff and the State Highway Commission of New Jersey, and that the said Commission adopted a resolution approving a certain plan, but as to the effect of said resolution and the contents of said plan these defendants refer to the original minute of said resolution and to the said plan when the same shall be produced before this Honorable Court. These defendants deny that said plan was officially signed and approved pursuant to the authority of said State Highway Commission as set forth in the sixth paragraph of the Bill of Complaint.

3. These defendants have no knowledge or information relative to the matters set forth in the seventh paragraph of the Bill of Complaint, and therefore deny the same, except that they say that the proceedings before the defendant Board mentioned in said Bill were instituted on the Board's own motion and were lawfully instituted.

4. They admit that the plan adopted by the defendant Board was estimated to cost $324,400, while the plan alleged to have been approved by the State Highway Commission, with certain modifications and presented by the Railroad Company to the defendant Board, was estimated to cost $205,184.70, and they say that such estimated cost included certain property damages but not all property damages. They admit that said plan presented by the Railroad Company was entirely feasible and practicable, but deny it was sufficient to meet the requirements of the locality in which the crossing is situated or of public convenience and necessity, and they deny that said plan meets all obligations and duties imposed upon the plaintiff by law.

5. They deny the ninth and tenth paragraphs of the Bill of Complaint.

6. They admit the eleventh and twelfth paragraphs of the Bill of Complaint, except that they say that the statutory provisions mentioned in the twelfth paragraph denouncing certain acts or omissions as a misdemeanor do not apply to the order of the defendant Board mentioned in said Bill or to any acts or omissions in violation of said order or of the statute commonly known as the Fielder Grade Crossing Act on which it is based.

7. They admit that if the plaintiff does not comply with said order they will endeavor by the aid of the New Jersey Supreme Court in a suit for mandamus or by the aid of this Honorable Court or of the Court of Chancery of New Jersey in a suit for an injunction, to coerce the plaintiff into complying with said order; and these defendants deny that they have at any time threatened or contemplated or that they now contemplate any other suit, action or proceeding [fols 116 & 117] or act whatsoever against the plaintiff, its officers or agents, or any of them, to compel compliance with said order; and these defendants deny that the plaintiff's agents or any of them are or will be intimidated or coerced by any such threats or that the plaintiff will be wrongfully deprived of any sums of money as alleged in the thirteenth paragraph of the Bill of Complaint.

II

These defendants further answering say that:

1. The plaintiff is now and for many years has been operating a railroad in the State of New Jersey. A public highway known as State Highway Route No. 16 and another public highway known as Camp Lane or Camplain Road in the Township of Hillsborough in the County of Somerset in said State, cross and at all times hereinafter mentioned, have crossed the said railroad at the same level.

2. The defendant Board of Public Utility Commissioners on its own motion on November 24, 1926, proceeded with respect to said crossings to determine whether said crossings were dangerous to public safety and whether the public travel on such highways was impeded by said crossings, and to determine what, if any, order should be made by said Board for the alteration of said crossings, and to determine all other matters involved in or incidental to the separation of the grades of said highways and of said railroad. The said Board on the said day did, by its order, fix a time and place for a hearing in said proceeding and direct that notice thereof be served upon the parties named therein, including the plaintiff.

3. Reasonable notice, namely two weeks' notice of such proceeding and of the time and place for hearing was given to plaintiff, among others, pursuant to said order. At the time and place set and from time to time thereafter pursuant to adjournment, the said Board did hear the evidence and arguments presented to it relative to the matters aforesaid. The plaintiff appeared before the said Board at these hearings and had full opportunity to present and did present to the Board such evidence and arguments as it thought fitting.

4. The hearings having been concluded, the Board considered the evidence and arguments presented and on April 26, 1927, made and issued its decision and order, a copy of which order is annexed to the Bill of Complaint, whereby it directed the plaintiff to eliminate said grade crossings in accordance with the terms of the last mentioned order and of a certain plan thereto annexed.

5. The said decision and order of the defendant Board were in all respects supported by the evidence presented at the hearings above mentioned, which said evidence or a transcript thereof these defendants are ready to present to this Honorable Court, that this Court may determine whether or not the same support the said findings and order of the defendant Board.

6. Plaintiff ought not to be heard or allowed to allege or present in this Honorable Court other facts and evidence than it presented before the defendant Board at the said hearings, proving or tending to prove that the said order of the defendant Board is confiscatory or operates to deprive the plaintiff of its property without due process of law or is otherwise invalid.

John O. Bigelow, Solicitor for and of Counsel with Above-named Defendants.

[fol. 118] In United States District Court

[Title omitted]

Notice of Motion to Strike Out Answer

To John O. Bigelow, Esquire, Solicitor for Defendants.

Dear Sir: Please take notice that on Tuesday, the first day of November, 1927, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall move before such judge of this court as shall sit at the said time and place to hear motions, to strike out the affirmative defense set up as Part II of the answer filed herein, on the ground that said affirmative defense is irrelevant, immaterial and insufficient in that it fails to state a good defense to the cause of action alleged in the complaint.

Respectfully yours, Hobart & Minard, Solicitors for Plaintiff.

Dated Newark, N. J., September 27, 1927.

[fol. 119] In United States District Court

[Title omitted]

Stipulation Extending Time of Argument of Motion to Strike Out Answer

It is hereby stipulated and agreed between the parties that the argument of the foregoing motion to strike out the affirmative defense set up in the answer, filed herein, be and the same is hereby continued until the trial of this cause.

J. O. Bigelow, Solicitor for Defendants. Hobart & Minard, Solicitors for Plaintiff.

Dated September 29, 1927.

Service of the within Notice is hereby acknowledged this 29th day of September, 1927.

J. O. Bigelow, Solicitor for Defendants.

[fol. 120] In United States District Court

[Title omitted]

(On Final Hearing)

Stipulation of the Record

This cause having been set down for final hearing on January 18, 1928, before the Honorable J. Warren Davis, Circuit Judge, and Joseph L. Bodine and William N. Runyon, District Judges;

It is hereby stipulated and agreed between the parties that the same be submitted for final hearing and determination on the following record:

1. The record before said court on the hearing of the order to show cause why an interlocutory injunction should not issue, consisting of the following:

(a) Bill of Complaint

Exhibit "A" annexed to bill of complaint, P. U. C. Order, April 26, 1927, and plan adopted by the Board.

Affidavit of Duane E. Minard, of May 31, 1927.
Affidavit of William R. Johnston of May 31, 1927.
Exhibit "A," annexed to Johnston Affidavit of May 31, 1927. (Board's order of November 24, 1926 instituting proceedings.)
Exhibit "B," Board's division.
Exhibit "C," plan "C."

(b) Supplemental Affidavits and Exhibits

Affidavit of William R. Johnston, June 2, 1927.
Exhibit "D," schedule of highway curves.

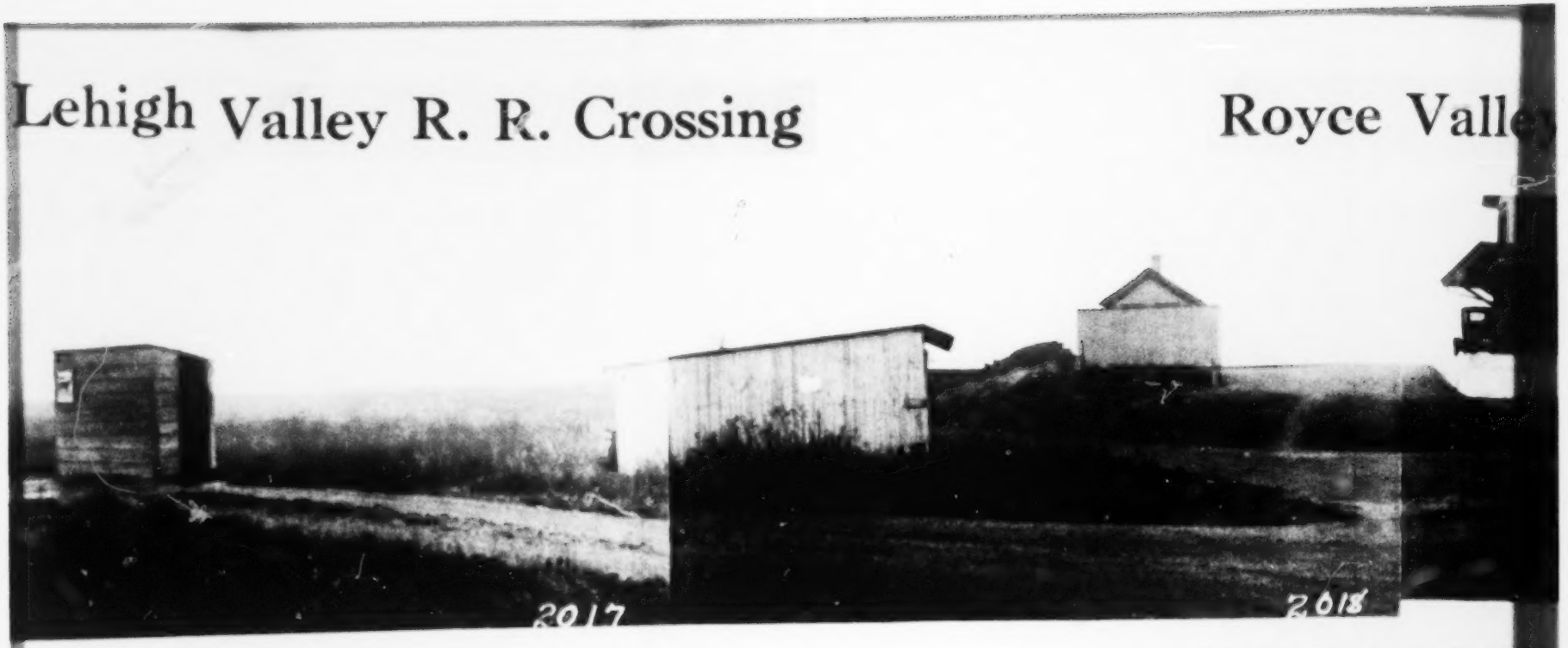
[fol. 121] Exhibit "E," Record and minutes of State Highway Commission, respecting State Highway Route No. 16.
Exhibit "F," Plan "C" as signed by the parties. (Consisting of six blueprint sheets.)
Exhibit "G," Camp Lake Plan.
Exhibit "H," Board's Profile.
Exhibit "I," Railroad estimate.
Exhibit "J," Hood's estimate.
Affidavit of George T. Hood.
Affidavit of C. E. Holden.
Affidavit of Charles E. Venneman.
Affidavit of Walter Steele.
Affidavit of George C. Diehl.
Exhibit "K," Certified copy of record of laying out State Highway Route No. 16.

(c) Affidavits and Exhibits for the Defendant

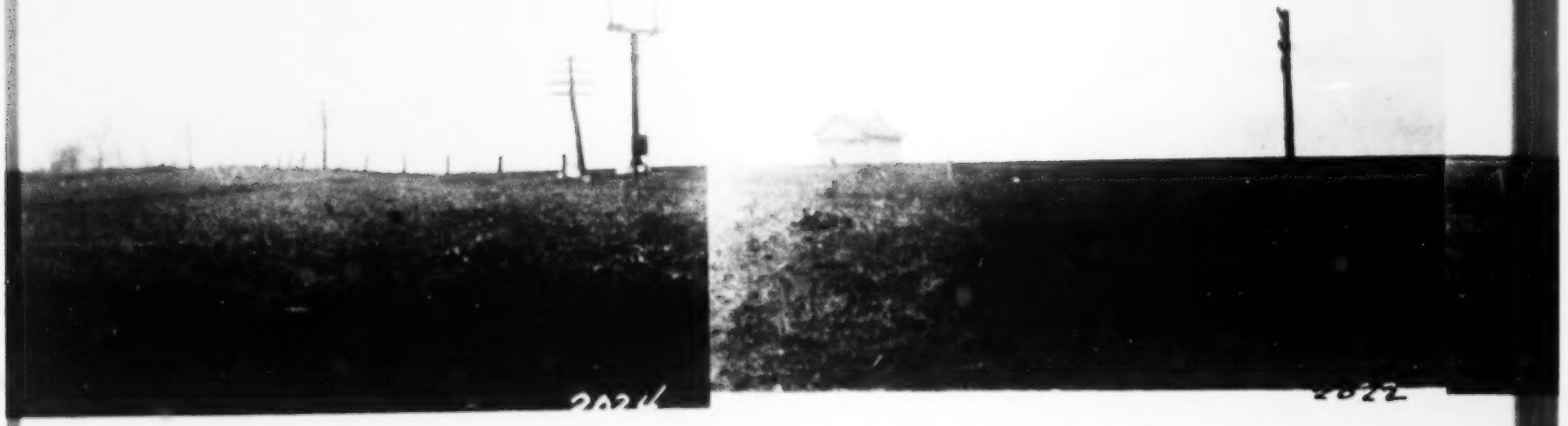
Affidavit of Charles F. Bodwell, June 8, 1927.
Affidavit of A. Lee Grover, June 10, 1927.
Affidavit of Charles A. Wood, June 8, 1927.
Affidavit of H. P. Brainard, June 9, 1927.
Affidavit of Alfred N. Barber, June 9, 1927.
Justice Parker's memorandum opinion, denying application for writ of certiorari.
Supreme Court Order, June 6, 1927, denying application for writ of certiorari.

Lehigh Valley R. R. Crossing

Royce Valle



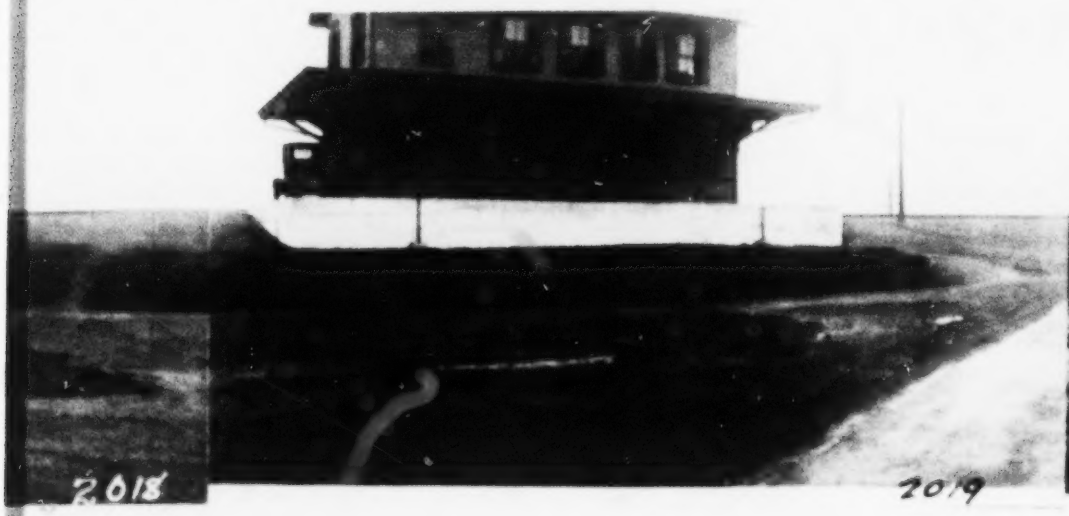
Looking South on State



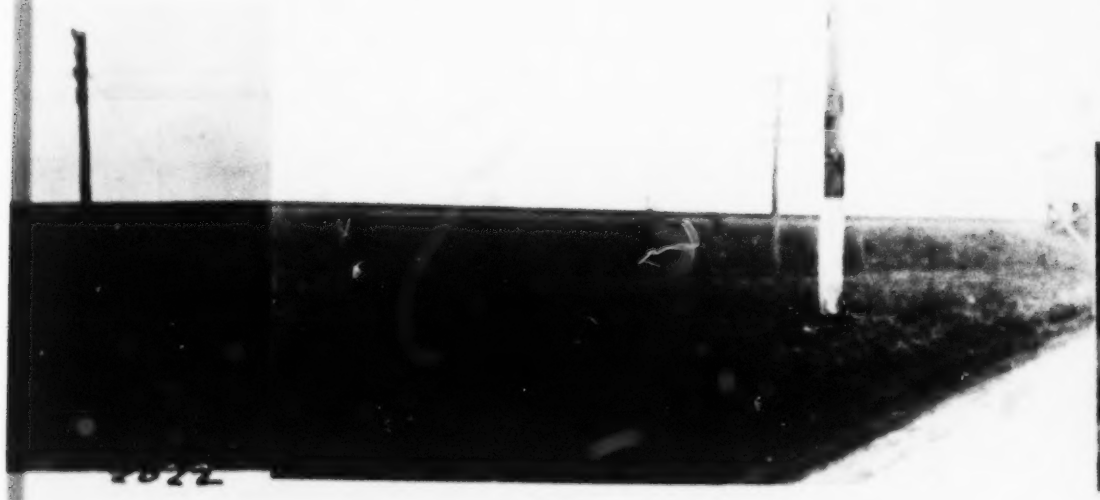
Looking North on Stat

Royce Valley

N. J. State Highway No. 16

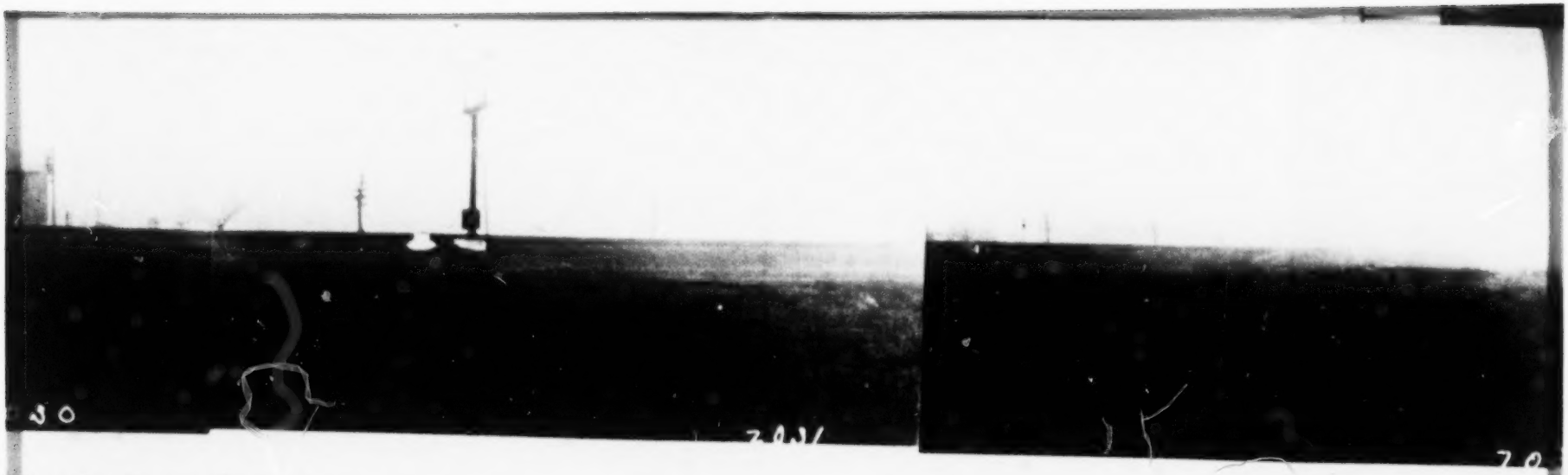


king South on State Highway



Looking South on Camp La

Looking North on Camp La



ing South on Camp Lane

ng North on Camp Lane

EXHIBIT C. 4. (16 Ph
Hearing at Newark 12
Photo taken Nov. 26,

[fol. 125a]

[fol. 125b] Recapitulation of Traffic Count Taken at State Highway

Friday, November 12th, 1926	6 A M to 7	7 A M to 8	8 A M to 9	9 A M to 10	10 A M to
Pedestrians	1	0	13	0	2
Automobiles	15	53	54	83	69
Other Vehicles	0	0	2	0	2
Passenger Trains	0	2	2	1	2
Freight Trains	1	0	2	1	0
Light Engines & Drill Movements	0	0	0	0	0
Total	17	55	73	85	75
Delays:					
Total Time	2:45	2:50	6:10	3:15	2:05
Av. Delay per Move't	2:15	1:25	1:33	1:38	1:02
Maximum Delay	2:15	1:50	2:40	1:45	1:05
No. of Vehicles Delayed	0	1	5	1	3

[fol. 125c] Recapitulation of Traffic Count Taken at State Highway

Saturday, Nov. 13th, 1926	6 A M to 7	7 A M to 8	8 A M to 9	9 A M to 10	10 A M to
Pedestrians	5	1	0	0	2
Automobiles	25	67	64	129	51
Other Vehicles	0	2	0	2	0
Passenger Trains	0	2	2	1	1
Freight Trains	3	2	1	1	1
Light Engines & Drill Movements	1	2	0	3	0
Total	34	76	67	136	51
Delays:					
Total Time	6:30	3:40	4:00	9:40	3:50
Av. Delay per Move't	1:38	:57	2:20	1:56	1:55
Maximum Delay	2:05	1:50	1:40	2:50	3:10
No. of Vehicles Delayed	1	2	2	33	2

[fol. 125d] Recapitulation of Traffic Count Taken at Campbell Re

Friday, Nov. 12th, 1926	6 A M to 7 A M	7 A M to 8 A M	8 A M to 9 A M	9 A M to 10 A M	10 A M to 11 A M
Pedestrians	2	5	5	1	2
Automobiles	4	3	9	6	8

[Fol. 125a]

EXHIBIT C-5

Royce Valley Traffic Count

[Fol. 125b] Recapitulation of Traffic Count Taken at State Highway Route No. 16 Crossing, Royce Valley, Lehigh Valley Railroad. Friday

Friday, November 12th, 1926	6 A.M. to 7	7 A.M. to 8	8 A.M. to 9	9 A.M. to 10	10 A.M. to 11	11 A.M. to 12	12 M. to 1	1 P.M. to 2	2 P.M. to 3	3 P.M. to 4	4 P.M. to 5	5 P.M. to 6	6 P.M. to 7
Pedestrians	1	0	13	0	2	0	0	0	1	25	0	2	1
Automobiles	15	53	54	83	69	76	78	70	108	124	159	111	53
Other Vehicles	0	0	2	0	2	2	0	1	2	6	0	2	0
Passenger Trains	0	2	2	1	2	0	1	1	0	0	1	2	1
Freight Trains	1	0	2	1	0	3	2	1	2	5	1	1	1
Light Engines & Drill Movements	0	0	0	0	0	0	1	1	0	1	2	0	0
Total	17	55	73	85	75	81	82	74	113	161	163	118	56
Delays:													
Total Time	2:45	2:50	6:10	3:15	2:05	9:10	6:20	3:45	4:25	10:30	8:00	7:00	3:40
Av. Delay per Move't.	2:15	1:25	1:38	1:38	1:03	3:03	1:37	1:15	2:13	1:45	2:00	2:20	1:50
Maximum Delay	2:15	1:50	2:40	1:45	1:05	3:30	2:50	1:55	3:00	2:50	4:20	3:20	3:00
No. of Vehicles Delayed	0	1	5	1	3	5	6	2	8	13	9	8	5

[Fol. 125c] Recapitulation of Traffic Count Taken at State Highway #16 Crossing, Royce Valley and the Lehigh Valley R. R. Saturday, N

Saturday, Nov. 13th, 1926	6 A.M. to 7	7 A.M. to 8	8 A.M. to 9	9 A.M. to 10	10 A.M. to 11	11 A.M. to 12	12 M. to 1	1 P.M. to 2	2 P.M. to 3	3 P.M. to 4	4 P.M. to 5	5 P.M. to 6	6 P.M. to 7
Pedestrians	5	1	0	0	2	0	0	0	0	0	0	0	1
Automobiles	25	67	64	129	514	1,376	1,162	348	124	130	228	1,195	1,144
Other Vehicles	0	2	0	2	0	1	0	1	4	0	0	1	0
Passenger Trains	0	2	2	1	1	0	1	0	1	0	1	3	0
Freight Trains	3	2	1	1	1	0	3	2	2	2	2	1	1
Light Engines & Drill Movements	1	2	0	3	0	0	0	0	0	3	0	0	0
Total	34	76	67	136	518	1,377	1,166	351	131	135	231	1,200	1,146
Delays:													
Total Time	6:30	3:40	4:00	9:40	3:50		6:58	3:40	4:00	6:05	2:10	4:40	1:40
Av. Delay per Move't	1:38	:57	2:20	1:56	1:55		1:55	1:50	1:20	1:13	:43	1:10	1:40
Maximum Delay	2:05	1:50	1:40	2:50	3:10		*3:30	2:00	1:55	3:30	*1:10	1:50	1:40
No. of Vehicles Delayed	1	2	2	33	39		183	20	8	23	5	52	x

[Fol. 125d] Recapitulation of Traffic Count Taken at Camplain Road Crossing, Royce Valley and Lehigh Valley R. R. Friday, Nov. 12

Friday, Nov. 12th, 1926	6 A.M. to 7 A.M.	7 A.M. to 8 A.M.	8 A.M. to 9 A.M.	9 A.M. to 10 A.M.	10 A.M. to 11 A.M.	11 A.M. to 12 A.M.	12 M. to 1 P.M.	1 P.M. to 2 P.M.	2 P.M. to 3 P.M.	3 P.M. to 4 P.M.	4 P.M. to 5 P.M.	5 P.M. to 6 P.M.	6 P.M. to 7 P.M.
estrians	2	5	5	1	2	0	0	0	0	7	1	0	0
Automobiles	4	3	9	6	8	8	1	3	7	12	10	4	5
[illegible]	0	0	0	1	1	0	0	1	0	1	0	0	0

Exhibit C-5

Royce Valley Traffic Count

at State Highway Route No. 16 Crossing, Royce Valley, Lehigh Valley Railroad. Friday, November 12, 1926. Weather: Clear

8 A.M. to 9	9 A.M. to 10	10 A.M. to 11	11 A.M. to 12	12 M. to 1	1 P.M. to 2	2 P.M. to 3	3 P.M. to 4	4 P.M. to 5	5 P.M. to 6	6 P.M. to 7	7 P.M. to 8	8 P.M. to 9	9 P.M. to 10	10 P.M. to 11	11 P.M. to 12	Total
13	0	2	0	0	0	1	25	0	2	1	0	0	0	0	0	45
54	83	69	76	78	70	108	124	159	111	53	66	41	29	35	22	1,246
[illegible]	0	2	2	0	1	2	6	0	2	0	0	0	0	0	0	17
[illegible]	1	2	0	1	1	0	0	1	2	1	3	1	1	0	0	18
[illegible]	1	0	3	2	1	2	5	1	1	1	1	1	4	3	5	34
0	0	0	0	1	1	0	1	2	0	0	5	0	0	0	0	10
73	85	75	81	82	74	113	161	163	118	56	75	43	34	38	27	1,370

6:10	3:15	2:05	9:10	6:20	3:45	4:25	10:30	8:00	7:00	3:40	15:15	2:02	8:25	3:50	8:30	107:27
1:33	1:38	1:03	3:03	1:37	1:15	2:13	1:45	2:00	2:20	1:50	1:42	1:01	1:41	1:17	1:42	1:44
2:40	1:45	1:05	3:30	2:50	1:55	3:00	2:50	4:20	3:20	3:00	6:50	2:02	2:50	1:40	2:25	6:50
5	1	3	5	6	2	8	13	9	8	5	14	2	5	1	3	91

at State Highway 216 Crossing, Royce Valley and the Lehigh Valley R. R. Saturday, Nov. 13th, 1926. Weather: Clear

8 A.M. to 9	9 A.M. to 10	10 A.M. to 11	11 A.M. to 12	12 M. to 1	1 P.M. to 2	2 P.M. to 3	3 P.M. to 4	4 P.M. to 5	5 P.M. to 6	6 P.M. to 7	7 P.M. to 8	8 P.M. to 9	9 P.M. to 10	10 P.M. to 11	11 P.M. to 12	Total
0	0	2	0	0	0	0	0	0	0	1	0	0	2	0	0	11
64	129	514	1,376	1,102	348	124	130	228	1,195	1,144	660	226	99	73	44	7,608
0	2	0	1	0	1	4	0	0	1	0	1	0	0	0	1	13
2	1	1	0	1	0	1	0	1	3	0	3	0	1	1	0	17
1	1	1	0	3	2	2	2	2	1	1	1	4	4	5	2	37
0	3	0	0	0	0	0	3	0	0	0	0	1	0	0	0	10
67	136	518	1,377	1,106	351	131	135	231	1,200	1,146	665	231	106	79	47	7,696

4:00	9:40	3:50		9:38	3:40	4:00	6:05	2:10	4:40	1:40	4:50	8:05	5:50	8:45	3:35	89:58
2:20	1:56	1:55		1:55	1:50	1:20	1:13	:43	1:10	1:40	1:13	1:36	1:10	1:28	1:48	1:36
3:40	2:50	3:10		*3:50	2:00	1:55	3:30	*1:10	1:50	1:40	2:40	4:35	1:25	2:30	2:10	4:35
2	33	19		183	20	8	23	5	52	x	x	18	16	14	4	

Taken at Campion Road Crossing, Royce Valley and Lehigh Valley R. R. Friday, Nov. 12th, 1926. Weather: Clear

8 A.M. to 9 A.M.	9 A.M. to 10 A.M.	10 A.M. to 11 A.M.	11 A.M. to 12 A.M.	12 M. to 1 P.M.	1 P.M. to 2 P.M.	2 P.M. to 3 P.M.	3 P.M. to 4 P.M.	4 P.M. to 5 P.M.	5 P.M. to 6 P.M.	6 P.M. to 7 P.M.	7 P.M. to 8 P.M.	8 P.M. to 9 P.M.	9 P.M. to 10 P.M.	10 P.M. to 11 P.M.	11 P.M. to 12 P.M.	Total
5	1	2	0	0	0	0	7	1	0	0	0	0	0	0	0	23
9	6	8	8	1	3	7	12	10	4	5	0	0	1	2	0	83
0	1	1	0	0	1	0	1	0	0	0	0	0	0	0	0	4
14	**8**	**11**	**8**	**1**	**4**	**7**	**20**	**11**	**4**	**5**	**0**	**0**	**1**	**2**	**0**	**110**

4	3	2	0	0	0	0	0	0	0	0	0	0	0	0	12
8	7	4	16	9	11	9	6	5	0	1	0	0	1	0	89
0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
12	11	6	16	9	11	9	6	5	0	1	0	0	1	0	102

mmary

ate Route No. 16, Royce Valley,
From 6 A. M. to 12 Midnight—
ovember 13th, 1926. Weather:

	Friday, Nov. 12th, 1926	Saturday, Nov. 13th, 1926	Daily average
	45	11	28
	1,246	7,908	4,427
	17	13	15
	18	17	17.5
	34	37	35.5
ve'ts	10	10	10
	1,370	7,696	4,533

	107°27"	80°58"
	1°44"	1°36"
	6°56"	4°35"
	91	

[fol. 125f] Summary

Traffic Count Taken at Champlain Road Crossing, Royce Valley, Lehigh Valley Railroad—From 6 A. M. to 12 Midnight—November 12th and November 13th, 1926. Weather: Clear

	Friday, Nov. 12 1926	Saturday, Nov. 13 1926	Daily average
Pedestrians	23	12	17.5
Automobiles	83	89	86
Other Vehicles	4	1	2.5
Total	110	102	106

(Here follows map, marked side folio page 126)

MAPS

TOO

LARGE

FOR

FILMING

Surveyed in 1886

Resurveyed in 1917

Edition of 1920

(d) On Petition for Rehearing

Plaintiff's petition for rehearing.
Defendant's answer to petition for rehearing.

2. Answer of defendant, Board of Public Utility Commissioners.

3. Notice of motion to strike out the affirmative defense set up as Part II, of the answer.

4. Stipulation continuing argument of said motion until final hearing.

5. Testimony taken before the Board of Public Utility [fols. 122-124] Commissioners.

6. The following additional exhibits offered at the hearings before said Board:

(a) Exhibit C-4, a composite of 16 photographs, 8 of the crossing on State Highway Route #16 and 8 of the crossing on Camp Lane.

(b) Exhibit C-5, Traffic Count at the crossing on State Highway Route #16.

(c) Exhibit C-6, State Geological Survey Map, Somerville Sheet, (being the same as "Exhibit 1, Montgomery Township" and "Exhibit 2, Montgomery Township").

(d) Exhibit S-1, Report of Thomas J. Wasser.

7. Verified statement of C. E. Hildum, dated January 10, 1928, of net Railway operating income up to November 30, 1927, Exhibit "L."

8. This stipulation.

This stipulation shall not be construed to prejudice or waive the rights or interests of either party respecting the allegations of the affirmative defense set up as Part II of the answer.

John O. Bigelow, Solicitor for Defendants. Hobart & Minard, Solicitors for Plaintiffs.

Dated Jan. 10, 1928.

(Here follow Exhibits C-4 and C-5, marked side folio pages 125, 125a, b, c, d, e, and f)

[fol. 127] EXHIBIT S-1

March 9th, 1925.

To the Honorable the Director and Members of the Board of Chosen Freeholders of Somerset County, New Jersey.

GENTLEMEN: In the matter of the proposed Elimination of the Lehigh Valley Railroad Grade Crossing over Route #16, of the State Highway System, at South Somerville, Hillsborough Township, Somerset County, by the New Jersey State Highway Commission and which your Honorable Board requested advice as to whether or not it is possible and practicable to confine the Grade Crossing Elimination to the present line of the Highway or would it be necessary to adopt a new line and location, such as was submitted to your Board by the State Highway Commission, and shown on plan entitled State of New Jersey, Highway Department, plans of Route #16, Section #5 A, Somerville to South Somerville, Somerset County, Scale as indicated January, 1925, I have the honor to report:

That I was furnished with a set of blueprints for the proposed improvement of State Highway Route #16, Section #5 A, consisting of sheets #1 to 30 inclusive.

[fol. 128] Sheet #1 in addition to the title already stated, provided for the signature of the following:

Assistant Construction Engineer.
Construction Engineer.
State Highway Engineer.
Chairman, State Highway Commission.
District Engineer, Bureau of Public Roads.
Chief Engineer, Bureau of Public Roads.
Director, Bureau of Public Roads.

and contained the signature of L. T. McCormick, Survey Engineer, and that on February 21st, 1925, in company with Mr. H. C. Van Emburgh, your County Engineer, and Mr. Howard F. Woolston, a member of your Board, I examined the location of the site, both on the present line of the Highway and along the line as proposed by the State Highway Commission.

In order to make a comparison between the two lines, it was necessary to obtain much field data as was not shown on the plans prepared by the State Highway Department;

namely, the elevation and grade of the Lehigh Valley tracks, profile along the center line of the existing Highway between Station 116 plus 59.58 and Station 140 plus 28.20, the angle at which the Highway crossed the railroad tracks, the elevation of the two stream beds in the vicinity, all of which were secured and furnished to me by your County Engineer.

I also attended the meeting at your Court House on Feb- [fol. 129] ruary 21st, 1925, at which time there was present representatives of Public Bodies and Civic Organizations interested in the proposed Grade Crossing Elimination.

The meeting was called to order and in the discussion that followed, it was brought out that the State's Engineers were quoted as saying:

First. That it was necessary to make the relocation in order to get adequate drainage without requiring the Railroad Company to raise its tracks.

Second. That to make the elimination on the present line of the Highway would cost $40,000 more than at the proposed location.

Third. That more accidents occur on the straight road than on curves.

Fourth. That the Lehigh Valley Railroad Company would contribute $20,000 as its part of the cost of the elimination.

The facts brought out by the field data obtained are:

First. The tracks of the Lehigh Valley Railroad are on an ascending grade running westward with a higher elevation at the intersection with the center line of the present highway than with the intersection of the center line of the proposed location and using the State's own design, as [fol. 130] shown for the proposed location, the same could be applied to the present highway crossing and have better conditions for drainage than at the proposed location without the need of raising the railroad tracks.

Second. That the streams have sufficient fall to take care of the drainage from either location.

Third. That the part of the present highway affected being a straight line is about 124 ft. shorter than the distance involved in the relocation as proposed.

Fourth. That the angle at the crossing is sharper along the line of the present highway than at the proposed location and would naturally increase the total length of the structure if located on the line of the present highway.

An examination of the plans prepared by the State shows that they propose to construct a row of columns in the center of the roadway where it passes under the railroad, [fol. 131] dividing the highway at this point into two passageways of approximately 18 ft. each. This type of construction has evidently been designed to lessen the cost of the structure, but might be the cause of serious accidents to traffic especially in foggy weather.

It surely would be necessary to maintain a lighted cautionary signal at each end of the row of columns. This type of construction is not at all desirable when it can be avoided and unless the Bureau of Public Roads has changed its policy in reference to obstructions in the Highway where it participates in the cost of construction, it would not approve it.

The State in recent years has eliminated a number of Grade Crossings and I do recall one that provided for columns in the center of the roadway.

For an example, I have in mind that D. L. & W. Railroad Crossing over Route #12, at Fox Hill, in Morris County. I particularly refer to this one because the conditions are almost identical with the conditions at South Somerville, that is, the angle at the crossing is practically the same as the angle would be using the present Highway at South Somerville and it was not necessary to erect columns in the center of the roadway.

[fol. 132] The Fox Hill Crossing provided a 30 ft. clear roadway and 5 ft. sidewalk without any obstructions.

The plans and agreements of the Fox Hill Crossing are a matter of record and are on file at the Highway Department.

As to the greater expense attached to the elimination if made on the line of the present highway rather than on the propose line, I have to say:

It is true that the structure will be longer by about 47 ft., making the total length of the covered portion about 121 ft. as compared to 74 ft. on the proposed location, but the

[fol. 135]

EXHIBIT 1-

Rate of Return on Property

Lehigh Valley Railroa

Calendar year ended:	Property investment	Total operating revenues	Total operating expenses	Railw tax acc
Dec. 31, 1923	250,989,203	75,935,154	66,754,214	2,323,
Dec. 31, 1924	257,505,658	76,374,805	60,967,968	3,201,
Dec. 31, 1925	258,468,372	74,430,573	57,433,390	3,604,
Dec. 31, 1926	268,055,467	80,453,150	60,958,636	4,193,
11 Mos. Nov. 30, 1927	268,055,467	69,055,270	54,814,564	3,203,

NOTE.—Property Investment 11 Mos. Nov. 31, 1927 as of Dec. 31 tions—1912-1916.

Sworn and subscribed before me this Tenth day of January Co. Clk's No. 1656. Reg. No. 3721. New York Co. Clk March 30, 1929. (Seal.)

·rty Investment

lroad Co.

ailway accruals	Uncollectible railway revenue	Hire of equipment & jt. facility net rentals	Net railway operating income	
			Amount	Rate of return
323,308	3,935	Dr. 280,576	6,573,121	2 62%
501,422	15,664	" 798,202	11,391,549	4 42
504,182	17,400	" 880,621	12,494,380	4 83
93,976	11,800	" 1,486,133	13,802,605	5 15
303,297	2,527	" 1,757,405	9,277,477	3 67

. 31, 1926. Rate of Return Based on Seasonal Fluctua

uary, 1928. Eugene S. Shreve, Notary Public, Queens Cl'k's No. 977. Reg. No. 9727. Commission expires

C. E. Hildum, Vice-President.

increased cost will not be proportional to the increased length of the structure and were it not for the difference in cost of handling traffic, I do not believe that increased cost would have been mentioned. However, so far as the State is concerned, there should be no difference in the cost of the structure,—it being a railroad proposition that comes within the provisions of the Fielder Grade Crossing Act P. L. 1913, page 91. Act held Constitutional 89 N. J. Law, page 57, affirmed 90 N. J. Law, page 672, subsequently affirmed by Supreme Court of United States and still in effect.

This Act puts the responsibility up to the Railroad Company and while it may be advantageous to all, in order to [fol. 133] expedite the elimination of any particular Grade Crossing, for the Governing Body in charge of the Highway to enter into an agreement with the Railroad Company where the Governing Body would assume part of the cost, but the cost to the State in this particular case should be the same in either location and if the terms and conditions of the Grade Crossing Elimination at Fox Hill were applied in this case, the cost to the State would not be increased.

The question of handling Highway traffic during construction would be greater if the structure were built on the line of the present Highway as there would not be any cost of handling Highway traffic at the proposed location.

As to the statement that more accidents occur on a straight highway than on curves, this is probably due to the publication of figures prepared from statistics on counts taken, but the fact is that the results show more carelessness on the part of the user of the road rather than the straightness of the road being the cause.

In conclusion, I will state that from the results of my [fol. 134] investigation of the matter, I can see no reason for for relocating the highway between Station 116 plus 59.58 and Station 140 plus 25.20 and the Railroad Company should be requested to eliminate the Grade Crossing on the line of the present highway.

Respectfully submitted.

(Signed) T. J. Wasser.

(Here follows Exhibit L, marked side folio page 135)

[fols. 136-138] Certificate of Geo. T. Cranmer, Clerk of D. C. U. S. District of New Jersey, to foregoing transcript omitted in printing.

[fol. 139] In United States Supreme Court

Case No. 54

Stipulation and Addition to Record—Filed March 8, 1928

It is hereby stipulated and agreed that:

1. The annexed is a true, complete and properly prepared statement in simple and condensed form of the testimony of witnesses who appeared and testified before the Board of Public Utility Commissioners, incorporated in full in Volume III of the stipulated record of this cause on final hearing and contained in Volume 4 of the record on appeal from final decree.

2. Said statement be filed as an addition to the record, and

3. Said statement be printed in the record on appeal from said final decree, in lieu and instead of said testimony in full.

Geo. Hobart, Duane E. Minard, Hobart & Minard, Solicitors for Plaintiff. J. O. Bigelow, Solicitor for Defendants.

Dated January 18, 1928.

[Endorsed:] United States District Court, District of New Jersey. Lehigh Valley Railroad Company, a corporation, plaintiff, vs. Board of Public Utility Commissioners et als., defendants. In equity. (On appeal from final decree.) Stipulation. Hobart & Minard, Solrs. for plaintiff. 24 Branford Place, Newark, N. J.

[fol. 140] The annexed statement in simple and condensed form of the testimony of witnesses considered on final hearing in the above entitled cause is hereby approved as a true, complete and properly prepared statement thereof.

Wm. N. Runyon, United States District Judge.

[fol. 141] In United States District Court, District of New Jersey

In Equity

Lehigh Valley Railroad Co., a Corporation, Plaintiff,

vs.

Board of Public Utility Commissioners et als., Defendants

(On Appeal from Final Decree)

Statement of Evidence in Simple and Condensed Form

Evidence Before Board of Public Utility Commissioners, Incorporated in Record of Final Hearing by Stipulation of Parties

Before Commissioner Frederick W. Gnichtel, Esq.

J. W. Queen, Esq., Counsel for the Board, Charles A. Mead, Esq., Engineer.

For Lehigh Valley Railroad Company appears: E. H. Burgess, Esq., and W. R. Johnston.

For Township of Montgomery appears: J. F. Roger, Esq.

For Township of Hillsboro appear: Clarkson A. Cranmer, Esq., and F. C. Young, Esq.

For Hunterdon County Board of Freeholders appears: F. W. Remsen, Esq.

For State Highway Commission appears: M. Goodkin, Esq.

For Citizens on the Highway appears: H. F. Woolston, Esq.

For Western Union Telegraph Co. appears: W. J. Higgins, Esq.

For Hillsboro and Montgomery Telephone Co. appears: P. A. Garrettson, Esq.

For Public Service Electric & Gas Co. appears: G. H. Blake, Esq.

For Himself appears: H. M. Wright, Esq.

[fol. 142] (Hearing Dec. 16, 1926)

ALFRED N. BARBER

I am secretary of the Board of Public Utility Commissioners and submit a copy of the Board's order initiating the proceedings (marked Exhibit C-1). Certified copy of order was mailed to Chairman of Township Committee of Township of Hillsboro, State Highway Engineer, Clerk of Board of Freeholders of Somerset County, Lehigh Valley Railroad Company, Public Service Electric & Gas Company, New York Telephone Company, Western Union Telegraph Company and Hillsboro and Montgomery Telephone Company. The notice was given November 29, 1926. I submit proof of publication and notice of hearing in Unionist Gazette of Somerville (Marked Exhibit C-2).

CHARLES A. MEAD

I am Chief Engineer of the Division of Bridges and Grade Crossings of Board of Public Utility Commissioners, and have examined and am familiar with the grade crossing at Royce Valley. I have made a survey, photographs and a traffic count on the highway and the railroad for 18 hours on three successive days. I have prepared a plan of possible elimination of the crossing on present location of the highway at the point where it crosses the railroad and an estimate of the cost of elimination. Blueprint plan (Marked Exhibit C-3) shows the relation of railroad to street known as State Highway Route No. 16 which is a State owned highway (sometimes referred to as South Bridge Street, Somerville). The next crossing east is known as Camp Lane, a comparatively unimportant route. State Highway #16, which is west of the Royce [fol. 143] Valley station, formerly South Somerville, is the direct line between Somerville and the country to the north—Princeton and Trenton. I offer copies of 16 photographs mounted on one sheet, taken November 20, 1926, showing Route #16 crossing from both sides and Camp Lane crossing from both sides (Exhibit C-4). I offer traffic count made at State Highway Route #16, Friday,

November 12, 1926, Saturday, November 13, 1926. The weather was clear; traffic count summarized on one sheet. Traffic records were also taken on the same days at Camp Lane Crossing (traffic count for both crossings, marked Exhibit C 5). I offer State of New Jersey, Department of Conservation and Development, Atlas Sheet, known as Somerville sheet, showing location of the crossings and the highway, from Somerville, to points south. The State Highway route is outlined in red and Camp Lane crossing in green. Series of black spots show growth around crossing and the development of houses and buildings (Map marked Exhibit C 6).

I have developed a scheme for eliminating the crossing on the location of the present highway crossing by carrying the highway under the railroad and raising the railroad 4.8 feet. Green shows the paved surface of the proposed highway; yellow shows the railroad tracks; red shows the proposed concrete abutment and centre pier; orange shows the sidewalk. It is proposed in this scheme to build a centre pier in the middle of the highway and two 20 ft. highway strips on each side of the centre pier; 14 ft. vertical clearance and room for 2 sidewalks, one to be built at this time and the other in the indefinite future, and to provide for changes necessary in station platform and out-buildings. Drainage is taken care of by building a culvert underneath the bridge. This plan calls for raising the railroad tracks at the crossing and depressing the highway about 14 feet.

[fol. 144] Immediately east of the station is the crossing referred to as Camp Lane. It is proposed to close that crossing and provide another road leading from the present turn at Camp Lane, south of the tracks, across to the state highway, connecting at some convenient point to the station. This plan shows in dotted lines, proposed relocation of Camp Lane. The country there is just open fields and this Lane could, apparently, go almost anywhere. I do not know whether this is the best location for it or not. I also offer a profile along the highway and along the railroad, showing the present condition and proposed changes in both. (This plan as revised was offered at the hearing on February 10, 1927, as "Scheme H P" and marked Exhibit P 10. The profile

as revised was offered at the last mentioned hearing, as "Profile Scheme H P" and marked Exhibit P-11). The crossing is one that is used a great deal and one at which trains pass at high speed frequently; the angle of skew is so great that a person using the highway can only conveniently see trains coming from one direction; that constitutes an element of danger due to the skew of crossing—29° 30'. The second day on which traffic count was taken was the day of the Princeton football game. In my opinion this crossing (apparently referring to State Highway Route #16) is dangerous to public safety, and travel is impeded by virtue of the grade crossing. This plan calls for abutments on a right angle distance of 66 ft. apart, which I understand to be the width of the highway, and due to the skew, the width of the bridge measuring along the railroad will be 134 ft. The width of the top of the bridge, measured parallel with the highway would be 105 ft. which will be the length of the centre pier. The plan contemplates a through plate girder bridge, with con- [fol. 145] crete floor. The girders would project above the top of the rail about 6 inches. Access to the station from the highway would be by steps from the sidewalk on the east side of the highway and by a driveway from a point further north on the highway. I think the only feasible way to eliminate this crossing is by carrying the highway under the railroad. I made no study or plan of elimination by relocation of the highway. This plan requires the acquisition of no additional land except for the connecting road from Camp Lane to Route #16. The slopes will not require additional land outside of a 66 ft. highway width, but retaining walls will be required in places.

Mr. Roger (Attorney for the Township of Montgomery) inquired whether the railroad company would raise the question whether the crossing is a dangerous crossing and whether travel is impeded thereby, or whether the hearing is to be confined to the question of whether the crossing should be at this particular place or at some other place. He said "I was wondering whether we could agree on what the issue really is."

Commissioner Gniehtel: Are you prepared to make a statement in regard to that?

Mr. Burgess: On behalf of the railroad I will state we are willing to co-operate in some scheme of eliminating this grade crossing, providing a plan, a reasonable plan, has been worked out for that purpose, without going into the question of the dangerous condition at the crossing. I think perhaps everyone in this room knows this crossing has been the subject of negotiation more or less formal [fol. 146] and informal over a period of one or more years, and that the railroad throughout has been willing to join in some scheme of elimination if a satisfactory scheme could be devised. So that, in a continuation of that same policy of ours we are not raising any serious question about the dangerous condition of this crossing, but we have some plans and some ideas of plans which do not accord with the plan which has been introduced.

Commissioner Gniehtel: This is a contemplated plan that the Board suggests.

Mr. Burgess: Yes.

Commissioner Gniehtel: Do you admit that the crossing is dangerous, and that it impedes travel?

Mr. Burges: How is that?

Commissioner Gniehtel: You admit it is a dangerous and it impedes travel, or you don't dispute it, if you want to put it negatively.

Mr. Burgess: I don't know how else to state it than I have stated it. We are perfectly willing to agree without joining issue on the question of the danger.

Commissioner Gniehtel: You put it in a way that if this case went up it might be reversed on that one issue and it might be a very unfortunate thing if that was the issue on which the case was reversed rather than the point in question. What you said was this: You made no serious contention on that question, and we better put in more proof.

Mr. Queen: The evidence already shows by this witness [fol. 147] (referring to Mr. Mead) that he regards the crossing as a dangerous crossing. That was an opinion

which was founded upon the fact which he has already stated, as I take it.

Commissioner Gnichtel: Some of the facts he stated he wasn't in personal touch with as much as some other witnesses we had in mind calling. Perhaps we better proceed in the regular way.

Mr. Burgess: I don't want to take the time of the Commission on that question. I am perfectly willing to make it more *board* than I did make it. If I used the word "serious" I withdraw the word "serious" and consent to the necessity for the elimination.

Commissioner Gnichtel: I think that will cover it.

(After further discussion.)

Mr. Queen: "I might call to the Commission's attention that we have prepared the evidence on the question involved in the notice as to its being a dangerous crossing and as to its being such as to impede traffic, but these questions are now out of the way by the admission of the counsel for the railroad."

William R Johnston (for the Railroad Company)

I am engineer of grade crossings of the Lehigh Valley Railroad Company. It is my business to study conditions at grade crossings over the entire system, particularly when the question of eliminating a grade crossing arises. I am familiar with the grade crossing at Royce Valley station and with the plan of it. I have gone over the [fol. 148] ground. A plan has been worked out by me in conjunction with other engineers for the Company showing the manner in which and the location at which it would be possible to eliminate this crossing. I present that plan which is numbered, W. H. R. 192, (marked Exhibit R. R. 1). This plan contemplates diverting the alignment of the present State Highway Route #16 to pass under the grade of the railroad at a point about 150 ft. past *of* the depot. The degree of curvature on the new section of road to be constructed would be 6 degrees—a radius of curvature of 955.37 feet. I propose a 2 span flat slab concrete bridge with no girders projecting above the rails of

the railroad track that might interfere with passengers getting off trains at the depot. There is a very serious objection to having the girders of the bridge protrude above the levels of the rails where trains are stopping at the station on account of the possible danger that a passenger might incur in alighting or getting on the train in stumbling over the girder. I propose a flat slab concrete bridge for that reason as well as for the reason that it is objectionable in any event to put girders between the tracks of a railroad if they can be avoided. This is a more economical type of bridge than steel construction. Under this plan the grade of the highway would be 3.29% on the north side and 1.1% on the south side of the railroad. The width of this bridge measured along the centre of the highway is 75 ft. and the length of the abutments is 125 ft. overall. The length of the centre pier of this bridge is less than if the bridge were constructed on the present location of the highway. I think a sidewalk is desirable. I propose the relocation of the highway because it shortens the [fol. 149] length of the bridge under the railroad on account of the greater skew angle of the present crossing. The present crossing is at an angle of 29 degrees. The plan I propose is at an agle of 54 degrees. This plan permits a flat type of construction which would avoid any girders projecting above the rails and permit the passenger to use the depot without danger. Mr. Mead's plan would require girders projecting 5 or 6 inches above the top of the rail. This plan will facilitate the construction of the Camp Lane road by permitting Camp Lane road to be diverted to join this road with less highway construction. I have prepared a plan to show this marked W. H. R. 197 (offered as Exhibit R. R. 2). This plan would take Camp Lane road at a point at the junction of the road marked Manville on this Exhibit, which shows the line of a road that has been dedicated by a company known as the Marvel Realty Company, to a point where that property joins the lands of William Smith, and from there on we propose to construct a new highway 40 ft. in width which extends to the junction of the State Highway route as we propose to locate it on plan W. H. R. 192, at a point 168 ft. south of the centre line of the railroad. This provides a highway roughly 500 ft. shorter than if the route 16 crossing was

eliminated at the present location, and would intersect the proposed highway at a much greater angle than it would be if depressed and eliminated on the line of the present highway. If the connection of Camp Lane Road were laid out parallel with the track a person going north would have to make a back turn, if it were connected with the present highway. Under the Mead plan you could simply extend this connection a little further to connect with the road as it now is, but it would involve a very acute angle at the connection unless it were swung around at a right [fol. 150] angle. The cost of the Mead plan is at least double that of this plan. From a point some distance west to a point some distance east of the crossing, the railroad is straight and the highway is also straight, for some distance on each side of the crossing. This plan will require the relocation of about 900 ft. of the highway east of the crossing and approximately 1,200 ft. west of the crossing. There is no road now at the place of the proposed relocation. In making the statement that the Mead plan would cost more than twice as much as this plan, I took into consideration the land that would have to be purchased for this plan. My figures did not include Camp Lane. The difference between my figures and Mr. Mead's estimate is largely in the cost of the bridge, his being longer, and the raising of the tracks is a large item. The sidewalks in Mr. Mead's plan would also increase the cost. It is possible to drain the underercossing at either location, but more expensive at the present location. At Camp Lane the new highway would be depressed 7 ft. at the junction. This depression could be constructed so that a highway traveller could see in both directions by cutting down the bank slightly. This plan contemplates no elevation of the tracks. It affords 14 ft. minimum underclearance under the railroad—the same as Mr. Mead's plan. It provides for a straight highway for a distance of 65 ft. south of the tracks and for a distance of 200 ft. from the end of the centre pier of the bridge, on the north side. The connection between Camp Lane road and the proposed State Highway is approximately 55 ft. from the railroad, at that point the highway would be in a cut about seven feet deep. If the bank was graded back, which could be readily done, there would be a proper view of the highway. Toward

the north a traveler could see under the railroad bridge, when he made the turn from Camp Lane into the state [fol. 151] highway.

MRS. W. CREMER

I own a store and an acre of ground here (indicating on map). If they turn off the old State Highway they put me off the State Highway. That means that if people want to come to my store from this direction they would have to come down and go up again. It would damage me very badly if that proposition would go through.

GEORGE W. YOUNG

I am interested because I own land both north and south of the road. I want to object strongly against a curve in this road for no reason. As a taxpayer I object for 2 reasons. This is on a straight way with a view on both sides. Then in Camp Lane we build an abutment and it obstructs the view. It will continue to get worse with stores and buildings build up. The Camp Lane situation is very bad. As to the curve, a car is always liable to skid, and we have fast traffic out there. We have no State Highway vehicle law and no traffic signs to stop traffic and we have traffic very fast on that road, practically a straight road, going around a curve that way a car is liable to skid and at the intersection is likely to be cut off by going in and cutting off there, which makes it very dangerous. I can visualize a 6 degree curve. I am a contractor, not an engineer. I have built roads, but not state roads. I have built bridges for railroads and county bridges. There are a great many places around the state where more than a 6 degree curve is constructed on improved highways. It would be unusual to build a curve of this degree when the road is straight. There are a lot of roads with the same curve, a lot more have to be when the circumstances war- [fol. 152] rant it being there. I think it very dangerous to have the Camp Lane road connect into the curve at the

point near the railroad and the curve itself. If Camp Lane road were connected into the existing road it would still be dangerous in a way, not in the same way because the traffic is going straight across. It don't intersect the curve and there is no intersection up there with a concrete abutment and the bank which cuts off the driver's view before he comes in the state highway. That is one of the most dangerous things I ever saw. The proper idea, and it would answer my objection, if this connection were so constructed that the bank was cut off, lowered, done away, so that a vehicle coming out of Camp Lane road would have a clear view to the right and left. My principal objection is making a curve in the straight road.

J. F. Keefer

I own property at South Somerville, about ½ mile south of the station. South Somerville and Royce Valley are the same. The method of eliminating this crossing will affect me insofar as I travel that road twice a day from Somerville. I consider it dangerous to go underneath that [fol. 153] railroad and that curve. I have been driving a car a good many years and I know what it means to have that view obstructed. It wouldn't affect the property in any way. The State Highways are finished. If for a distance of 350 ft. where the new road would pass under the railroad it would be on a straight line, the view would not be obstructed going toward the underpass, not standing looking at it, but if you were traveling 35 miles an hour it wouldn't take long to reach that point. If I could see a vehicle ahead 500 ft. when I was rounding a 6 degree curve I would not contend that the view was obstructed.

William R. Johnston (Recalled)

A vehicle rounding a 6 degree curve would be able to see ahead in the line of travel within the limits of the highway for 500 ft., and a vehicle using this curve would at all times have a clear view ahead of that distance, but if this

route is out in the country where it is flat on each side you could see an indefinite distance. It was for the purpose of preserving this view that we have kept the road straight where it passes under the tunnel.

H. M. Wright

I am the owner of property on the south & west side of the station. My principal objection, outside of the objection against the curve, is the fact that if this road is put in as proposed by the railroad, it will undoubtedly, of course, produce a dead end of the present road on each side of the railroad—a distance of 1,200 ft.—about 600 ft. on each side. The State Highway Department approached us along that right of way and wanted to buy or have us deed sufficient land to make the highway 66 ft. Some of the citizens gave them the land, the rest of us charged them a nominal sum for the land. A portion has already been taken off my property. Had they told me at the [fol. 154] time that they were going to make the road crooked I certainly would not have signed off at any price. I bought this place because it was on a developed road. I moved from a dirt road to get on a stone road. I gave up a big property. I have 12 acres there. I moved from 70 acres in order to get onto a good stone road to be handy to the station and handy to Somerville. These gentlemen haven't taken into account damages they will have to pay me if they go around that curve, and it is going to be a good part of their saving. If they will give me the property between the new and the old road that would compensate my damages. I have four children, two of whom go to school in Somerville by the bus. I pay for their transportation. Now they go to the corner at the end of my line and get the bus. If they go on that way they will have to walk to another corner across the road where there is traffic going in the opposite direction to get the bus going north.

Hearing February 10, 1927

CHARLES A. MEADE (Recalled)

In order to meet the two major objections of the Railroad Company since the last hearing, I have prepared another plan and estimate with a profile for a crossing elimination on the same location as the present crossings and have designated this as Scheme H. P. This provides for leaving the railroad tracks at nearly their present level. Really there is a six-inch rise at the point of crossing. (Plan marked Exhibit P 10. Profile marked P 11.)

Scheme H. P. and profile provide for a 3% grade on the highway from the north side of the railroad track and a 3.16% grade on the highway south of the track. I have prepared an estimate based on this plan and profile, showing [fol. 155] a total cost for bridge and approaches at highway route #16 crossing of $307,950 and for the proposed changes at Camp Lane crossing, $10,450.00, total $318,480.00, without including an allowance for the maintenance of the detours, which will probably be by the Camp Lane Road. The total time required for the work is one year, which does not necessarily mean that the crossing will be blocked all that time, and the total time required for the relocation of Camp Lane is 3 months.

Camp Lane is shown on this plan in a different location than on the plan I presented at the last hearing because I find there is a filed map of the property south of the railroad and the location of Camp Lane shown on this present exhibit follows the location of a street on that filed plan as far as the street goes. Beyond that point, it is brought into State Highway Route No. 16 south of the railroad tracks at the point where the profile of the highway meets the surface of the ground, so that there is no cut or fill at the point of intersection.

The plan includes under the bridge two highway passages twenty feet wide each between curves, a pier five feet wide in the centre of the roadway, and two sidewalks ten feet six inches from the place of abutment to the curbline. There are curb columns on these sidewalks. The net width of the sidewalks excluding the columns is about eight feet [fol. 156] six inches. According to the plan, the highway

is brought from its width of 20 ft. between curb lines, 200 ft. each side of the centre line of the bridge where the 20 ft. is widened out to a total width of 45 ft., which width of 45 ft. is continued for 200 ft. thru the bridge, 100' each side of the centre line. There are no sidewalks on the highway, either side of this crossing at the present time, and it is only provided in this plan that the space for sidewalks be left and that they be surfaced with cinders or screening. I do not know what the present width of the highway is. I am informed that the highway is being widened—that is the width between lines which is being acquired—is 66 ft. Perhaps in some places it is less and some places up to that. The plan contemplates keeping four tracks open all the while. Camp Lane will have to be improved and maintained for use as a detour during construction at an expense of about $6,000 which is not applied to the permanent relocation of Camp Lane Road. (The details of the estimate of cost for Scheme H. P. both at Highway Route #16 crossing and Camp Lane Crossing are shown in Mr. Mead's estimate which is Exhibit J in the record.) My estimate is based upon a 66 ft. highway width. If the highway is narrower it would lessen the cost. I will give a general idea of the proportion. The girders of the bridge would vary as the square of the plan and the floor would vary directly as the span, so that, so far as the floor of the bridge is concerned, a span twice as long will cost twice as much, and so far as the girders are concerned, a span twice as long would cost four times as much.

[fol. 157] WILLIAM R. JOHNSTON (Recalled)

Following the objection concerning the connection of Camp Lane with the State Highway, I made further studies and made a further plan that might be used to make that connection. Plan W. H. R. 192, (Exhibit R. R. 2) has been changed to show a relocation of that junction at a point 250 ft. south of the centre of the railroad where it would have a grade of 3½ ft. below the surface of the ground. This would provide unobstructed view to travelers going around the corner and would overcome the ob-

jections to view in the proximity of the underpass. This connection would be at right angles to the state highway. This plan was offered as exhibit R. R. 3. I do not know how wide the old highway was at No. 16 crossing before it was taken over as a state highway. The improved portion of this highway—the pavement—is 20 ft. wide at the other parts of this highway. Other crossings on the Erie, Jersey Central and Lackawanna and on the Lehigh at Perth Amboy have been eliminated in accordance with plans substantially identical with the plan I propose. An automobilist passing around a 6 degree curve has ample view for a distance of at least 500 or 600 ft. ahead of him. In my opinion a 6 degree curve will not impede travel in the least and will not obscure or endanger a traveler passing around such a curve. Plans substantially the same as these were approved by the Highway Department before this proceeding was commenced before the Board. Prior to the commencement of these proceedings there were negotiations between the State Highway Department and the Railroad, looking to the formation of an agreement for [fol. 158] elimination of this crossing, in which the railroad proposed a type of elimination substantially the same as this as to the curvature and location of centre columns. Those plans were approved by the Highway Department's engineer. I have made an estimate of the cost of carrying out this plan, showing cost at $145,024.47. This estimate is offered in evidence as Exhibit R. R. 8. I have made a further estimate for changing the location of Camp Lane Road connection with the State Highway amounting to an additional sum of $7,660.23. This additional estimate was offered in evidence as Exhibit R. R. 9. This plan, as so revised, makes the combined cost of the entire project $152,684.70 as compared with a cost of $318,400 for the Mead plan. Under this plan highway traffic would be accommodated during construction over the present crossing. The item of $1,080 contained in the estimate includes the right of way necessary for the relocation of highway route No. 16, and the cost of deepening the brook to provide drainage for the underpass and damages to property owners. I have made a study of highway route No. 16 for its entire length from Morristown to Princeton for the pur-

pose of determining the extent to which curves and tangents exist on this highway. I offer a tabulation of the results of my study. The information was obtained from plans of the highway department and from conferences with representatives thereof, who showed me plans upon which the road was improved. From this information the present exhibit was prepared, showing an analysis of the alignment of State Highway Route #16, between Morristown Township line, Morris County, and Labaw's Corner, in Montgomery Township, Somerset County, a distance of 27.38 miles. It is divided into several highway sections, [fol. 159] showing the length of each section, the length of curves and tangents the total number of curves, curves in excess of 6 degrees and their location. For the whole distance of 27.38 miles 19.24 miles are tangent and 8.14 miles are on curves. The total length of curves is 29.72% and the total length of tangents is 70.28% of the entire distance. There are a number of curves in excess of 6° on the improved part of this highway. These curves range from 44° 56' to 6° 30'. I found 18 curves that were in excess of 6 degrees. From my study of the highway I should say that this 6 degree curve, at this location, would not result in dangerous and inconvenient conditions. The analysis of alignment of highway route No. 16 was offered as Exhibit R. R. 10.

The estimate for this plan does not include any sidewalks under the bridge, but this item is covered by a footnote at the bottom of the estimate indicating that if the bridge is constructed to provide roadway openings of a clear width of 20 ft. and 2 sidewalk openings having a clear width of 9 ft. the total estimate would be increased $52,500, making a total cost of $197,524.47. The relocation of Camp Lane would add another $7,000— bringing the total up to $295,184.70.

In counting the curves in this State Highway, I did not include the two curves at the junction with the other highways, where right angle turns are made at Somerville. I did include the junctions at Bernardsville and Bedminster.

A person in a vehicle 100 ft. north of the bridge could see another vehicle coming from the south for a distance of 500 ft. at least. I do not think the view would be obstructed by the railroad structure, because our plan calls for only

[fol. 160] 1.1% grade on one side and 3.29% grade on the other side of the bridge. A Highway traveler could see under the bridge. The centre pier under the bridge would not obstruct the view ahead for the driver on the right hand side of the road where he is supposed to be. If a vehicle were coming on the left hand side of the road, it could be seen further ahead than if it were on the right hand side of the road. The fact that the highway is depressed wouldn't affect the highway traveler's view of conditions within a range of 500 ft. under this plan. The wingwalls of the abutments would not obstruct the view. The realignment of the highway as shown on this plan conforms to the plan that was approved by the State Highway Commission. This is not the same plan that was actually approved. It differs mostly in details. Their plan showed more detailed information than this one. A plan similar to this plan had the approval of the State Highway Commission. Subsequently they reconsidered it.

I estimated the cost of property at what we considered a fair value of it. The cost of possible condemnation proceedings was covered by our engineering and incidental items, which are intended for contingencies such as condemnation proceedings would be. I did not figure anything for damages to persons who were cut off from the State Highway by reason of its relocation, because we do not recognize any damages there. Damages to other properties which we consider would be damaged, is all included in our estimate as items of engineering and incidentals.

The additional length of highway proposed by this plan is only 125 feet. The descent to the undercrossing begins 800 ft. south of the crossing and 500 ft. north of the crossing. The highway embankment thru this territory cuts off a view from the highway on one side of the track to the [fol. 161] highway on the other, in either location, but as you start to descend to the opposite highway you look underneath thru the open bridge for a distance of at least 600 or 700 feet. The grade of the highway in this plan as compared with Mr. Mead's plan are approximately the same on one side and less on the other side; in so far as there is any difference, our plan has flatter grades. The length of the undercrossing in our plan is approximately 70 ft. Under Mr. Mead's plan it would be about 110 ft. In so far

as the bridge obstructing the views of highway travelers going down one or the other side of these grades, there would be a greater obstruction under the plan on the old location than under this plan, for there you have a longer tunnel and a longer bridge. At the beginning of the descent on our plan you are 475 ft. back from the outer edge of the bridge on the north side, and about 800 ft. on the south side, and the view would continue to improve on the descent, so that the poorest view the traveler would have would be for a distance of about 400 ft. ahead of him, in so far as concerns any obstruction to view caused by the structure of the bridge.

My estimate is based on a roadway 18 ft. with no sidewalks and I have added $52,500 to make it comply with the width and facilities which the Mead plan calls for. I have not seen any sidewalks on any part of this road on either side of the crossing. The total length of the tangent under the bridge is 370 ft. The curvature formerly existing in this highway at Duke's corner was approximately 17 degrees and the Highway Department acquired a parcel of property from the Duke estate that permitted the flattening of the radius of this curve to 955 feet, which is the radius of the curve as it stands there today. After this improvement [fol. 162] the curve at Duke's corner is the same as that proposed in our plan. Duke's corner is about 1,000 ft. from this crossing.

The plans of the Highway Department indicate that it has widened the highway to a greater width than its width before the improvement. I have obtained a copy of a plan from the State Highway Department's offices at Trenton which indicates the width of the old road and the width of the new. Before flattening out the curve at Duke's corner the highway was 33 ft. wide. It is now 50 ft. wide at that point. It indicates that the new width of the highway at this crossing is 66 ft. This plan is offered as Exhibit R. R. 15, to indicate that after the road has been widened or is to be widened no provision has been made for the acquisition of property of the railroad company for such additional width.

I do not know of any proceedings started to acquire land for the widening of the road immediately adjacent to the railroad. I was informed that steps had been taken to ac-

quire property of Mr. Brown with the idea of locating the new road where the present road is. This land would not be needed within the limits of the change we propose in our plans.

THOMAS J. WASSER sworn on behalf of Somerset County.

I am a civil engineer and have practiced my profession over 20 years. I have been county engineer of Hudson County, State Highway Engineer of New Jersey, Supervising Engineer of Hudson County and Engineer for Public Service Production Company in highway construction. I was connected with the State Highway Department just about 3 years. I was called upon by the Board of Freeholders in Somerset County to make an examination and [fol. 163] report of the proposed location of the South Somerville crossing, about 2 years ago. I examined the crossing and made a report (offered and marked in evidence as Exhibit S. 1). When I was called in I was informed that it was proposed by the State Highway Commission to abandon the line of the present highway for an alternate proposition to pass under the railroad at an angle less sharp to the line of travel than the existing highway. I looked into the relative merits of the two plans that were proposed at that time. The present highway where it crosses the line of the railroad is on a tangent and the State Highway Commission is spending millions of dollars to straighten all highways. To place the highway at a new location, such as was shown on a plan prepared by the highway department would make a curve in the highway and the design of the structure showed a centre pier and another thing in favor of the new location was that the angle was not as sharp. It is possible to construct the highway without the centre pier. The objections to the proposed plan of the new crossing was putting a curve in the road. It changed the line of the highway and placed property that had a frontage on the highway, they were now deprived of it. It would be cheaper in the new location, but the drainage could be taken care of adequately on the present highway just as well as in the new proposed location. In my opinion the plan on the line of the present highway

is more practical and more desirable. I do not believe in any obstruction in the centre of the highway, regardless of the cost to eliminate it. In the first place there will be a permanent projection. If there should be any foggy weather in the depression, people using the road are not always familiar with obstructions in the centre of the highway. My objection to the relocation plan was both on ac- [fol. 164] count of the centre column and the curvature in the road. My principal objection was to the curve. They are spending millions of dollars to straighten the highway and only a short distance above there they took a very expensive and fine wall of the Duke estate down to straighten the highway and then a few feet below they put a curve in it. I am not speaking of the danger of the curve. A 6 degree curve is a safe curve. If it is not necessary to change the alignment of the road it is poor policy to change it, in view of the fact of all the money being spent to straighten the highway. A curve would not be more dangerous with a bridge there than without it; that is a 6 degree curve, that is perfectly safe, even with the bridge there. At the Duke estate they cut a few feet off a fine wall just to ease a curve—to make a little better curve out of it. I do not know how many curves and tangents, or the percentage relationship between the curves and tangents, there are on this entire highway from Morristown to Princeton, but there are plenty of curves. Why add to them? I agree that the elimination project as a whole, will be considerably less expensive if you put in this curve than if you go through on a straight line. As an engineer I think it advisable to consider matters of economy in the expenditure of the public or even private moneys provided you do not produce a condition that is dangerous or inconvenient. Wherever it was possible to reduce a curve, that is the practice that was followed in the Highway Department in my time and these roads have been built since. I understand it is still the practice of the Highway Department to eliminate curves wherever possible. A 6 degree curve seems to be an accessible curve for all conditions. When I refer to spending millions of dollars to straighten the [fol. 165] highway I mean; as a fact this road has curves in it, they may be 6 degrees or they may be less or may be

greater, and if in a general way they can straighten out a stretch of road representing a mile or so they follow that practice, reducing the distance over the road. A six degree curve is safe. The fact that this curve would be in connection with an underpass with tracks elevated above and with columns or pillars in the centre of it, would not change my opinion at all. An underpass shuts off the view of an approaching vehicle for a period of time while on the grade. The measure of safety of a 6 degree curve depends on the speed at which you wish to travel, whether on the straight or curve; there is a certain amount of care and vision has to be utilized. But the big point in this underpass is that it will be necessary to have a down grade as you approach which shuts off the view of the driver of a vehicle approaching in the opposite direction, due to the construction of the roof of the underpass, which would obstruct the view very materially. I know of no case in which the State Highway Commission has changed a straight road by putting a curve in it. I know of no case in which the State Highway Commission has changed a perfectly straight road and put a curve in it.

CHARLES R. VANNEMAN (on Behalf of the Railroad)

I reside in Albany, New York. Am a graduate of Cornell University as Civil Engineer. I have been employed by Pennsylvania R. R. in Maintenance, Operation and Construction Departments for 5½ years. For the past 17 years with the Public Service Commission in New York State, as Chief of the Division of Transportation, Chief of Division of Steam Railroads, Engineer of Grade Crossings and for the past six years Chief Engineer in charge [fol. 166] of all engineering matters pertaining to Public Utilities, subject to the jurisdiction of the Public Service Commission of New York. Grade crossing elimination in New York comes entirely under my jurisdiction, from the inception of the project thru the hearings, and upon their completion, I make recommendations to the Commission for the adoption of an order determining how the elimination shall be made. With regard to keeping improved

highways perfectly straight in order to make them reasonably safe and convenient for the traveling public, we look at that in New York State in a different light, because of the fact that the citizen in New York pays ½ the cost of every elimination. We are controlled by producing plans which will eliminate the crossing safely and as economically as possibly and the matter of economy is an important factor in our grade crossing elimination work. We have no standard of curvature. We have curves less than 6 degrees and in my opinion a 6 degree curve on a State Highway is perfectly safe. We have built in the past 6 years over 25 grade crossing eliminations where the highway curvatures vary from 190 ft. up to 1,500 ft. radius. A 6 degree curve has a radius of 955 ft. and a fraction. I have known of instances and have supervised the plans as an engineer where a curve has been introduced in the highway similar to the proposal here made by the railroad company, for the sake of economy. Where highways crossed at an acute angle, as does the highway here, we have introduced such a curve, because it reduces the skew angle on the bridge, thereby shortening the span length, and in some instances it enables us to take advantage of geographical conditions to avoid excessive excavation, or lowering the depression in the roadway in case of an underpass. From the point of view of physical conditions existing with respect to the highway and the railroad the grade crossing at Brady, [fol. 167] just outside of Buffalo, in the Village or Town of Cheektowaga, is analagous case to this. There the angle of the crossing was about 20 degrees on one of the most important highways in the State of New York—an east and west trunk line highway. The Commission diverted the highway and changed the skew angle to approximately 45 degrees by introducing reverse curves having radii of 1,000 ft. (practically a 6 degree curve) with a piece of tangent under the crossing. This resulted in a very great deal of saving of expense.

I consider that it is necessary and advisable to consider questions of economy in construction where the resulting conditions will not be dangerous or detrimental to the public, and we always follow that practice.

I have examined the plan proposed by the railroad for the elimination of this crossing, provided a tangent under the bridge is provided of not less than 500 ft. in length, that is, 250 ft. on each side of the centre line of the bridge. I think the plan is entirely feasible and practical and safe and would not result in lessening the carrying capacity of the highway whatever. I do not think it would introduce any impediment or dangerous condition to travel provided the centre columns are adequately marked to take care of foggy conditions. In New York State we require all such columns to be either painted black and white with a checker board effect, or crossed with diagonal lines 6 or 8 inches wide, black and white, and then illuminate them by either a red light or what I believe to be preferable a white light overhead, which will reflect on the painted face. A red light is liable to be confused with the tail light of an automobile. From my own point of view I consider it desirable to divide the line of travel on a state [fol. 168] highway, as a column would do, particularly in a case of this kind no matter whether you have a single span or two spans. Where there is 40 ft. between curbs there is a natural tendency for vehicle drivers to pull away from the curb, that means they go toward the centre, and in many instances I have observed a virtual cutting down of a four line traffic highway to a two line traffic highway from the fear that persons have of getting or driving close to any curb or wall or any other feature of that character. On the other hand if you have a two line drive, such as you have in the design under discussion here this morning, that would not prevail. You would have two lines of traffic, passing simultaneously under both sides of the bridge. Our experience in New York is that the major portion of roadway accidents of collision of one vehicle with another occur on tangents. That is an entirely logical result because it is on tangents that the highest rates of speed are maintained and where following vehicles endeavor frequently to cut out from behind and go around the preceding one. On curves we find a tendency to slow down, and we find in our own experience, that curves preceding a structure of this character, where the view through the structure is ample, a long approach as would be the case in a structure of this design with 500 ft. tangent the speed is reduced and thereby the

element of danger is greatly reduced. Within certain limits, I prefer travelling on a curved highway. I don't say 150 ft. radius curve on a highway. Of course, that is obviously dangerous. Where your radii are 1,000 ft. you practically don't know you are on a curve, assuming, of course, that the engineer puts into the curve the superelevation which is required. Whether a curve is as safe a method of travel as a straight road, when the surface is glased with ice, as it frequently is in winter, depends on how you de- [fol. 169] sign your roadway. If the road has a superelevation, such as would permit of 60, 70 or 80 miles on a highway, your vehicle would, of course, slide down the bank toward the centre, making it more difficult to get around. On the other hand if it is given the ordinary superelevation there is but little tendency to do that, any more than there would be on the crown of your perfectly straight highway; there would be no more on a curve. On a 1,000 ft. radius curve, if a man tried to operate at 60 miles an hour he would probably skid if there was a glare of ice. I do not believe a curve would be more dangerous to travel in a fog than a straight curve. At night a fog is dangerous on any road. I do not think, from my practical experience, that it would be more dangerous to travel on a curve in a fog at night than on a straight road. I am talking about 1,000 ft. radii curves. I have been on the ground at this crossing about three or four weeks ago. In the past 6 years, we have eliminated crossings that were similar or almost exactly similar to this, to the extent of 25. Some of these already had slight curves in the roadway, either at the crossing or on one side or the other, but in order to reduce the cost in some instances, we increased the radius of the curve; we have changed the location of the crossing from one point to another, introducing a construction similar to that which has been described by the railroad company's plans. In the main east and west highway out of Buffalo, above described, we placed 6 degree curves in a perfectly straight highway. We have done the same in a number of other instances. One was just outside of Rochester on another main east and west highway (1926) almost identically the same situation, where the skew angle was even greater—about 30 degrees. Another one on the Delaware & Hudson R. R. near Afton, where the skew angle was not more than 20 de-

grees. In both cases the highway was perfectly safe and [fol. 170] there was no element in either case in introducing curves except the question of economy—reducing the cost. In 1925 we did the same thing near Watertown, N. Y., where the curve was introduced solely to take advantage of a fill on the railroad where we could go under the railroad tracks. We were able to build the highway on the ground as it existed. We do not order any structures with centre piers unless there is a tangent in advance of the centre piers of at least 200 ft. and the radii of curvature is above 500 ft. We have not ordered many crossings with centre columns, because we have not ordered many where the clear span between abutments is more than 32 feet. That is the reason we have not used centre columns. The contour of the country at the place of the crossings above mentioned was about like that at South Somerville. In some instances more rolling and in some quite flat. In some cases we take advantage of the fact that the country is rolling and that the railroad is on an embankment; all we have to do is excavate the embankment. Crossings of this character we could eliminate for $125,000. I would hate to spend the State, County and Township's money recklessly in doing this. The statute in the State of New York provides the expense 50% of it being paid by the railroad corporation and 50% by the State and the Municipalities, dividing 25% between the State's own grade crossing fund and 25% from the particular municipality, the Village or City or Township, if it is a Township.

Curves are not introduced primarily because of the topography of the country, but primarily to keep the cost down as low as possible, consistent with safety. Sometimes we have found people going into some excavation and fill in order to cut down the skew angle.

In this location at Royce Valley the country is practically [fol. 171] flat, only slightly rolling, I would call it. I would certainly consider it advisable to introduce curves of even 6 degrees in a highway that is now straight for the purpose of eliminating a crossing, for the saving of expense. No one would introduce a curve if it wouldn't accomplish something thereby. We always eliminate on a tangent if the expense is equal or substantially equal to that which we would find attach to a divergency from an exist-

ing line. We never put a girder between tracks now. We used to do that but we stopped it. If the cost of eliminating a crossing on the existing line of a highway will cost 100% more than by putting in curves we certainly would put in the curve. If we could save $20,000 or $30,000 we would do it, solely on the principle that every dollar we can save we can apply to some other grade crossing. With respect to the properties that will be taken off the main highway by putting in the curve, that is a question of consequential damage. We consider what that is providing it comes under our statute. Some of our experience with regard to a situation of that kind has been, we have bought the property and sold it for more than we paid for it so we got a credit on the cost. We always take that element into consideration. We won't put in a subway without a tangent of 500 feet at least. That means 250 each side of your centre line. There is no dangers to pedestrians if the sidewalk is provided.

W. R. Errs, Jr. (on His Own Behalf)

I object to the plan for Camp Lane Road—the extension of it as shown on R. R.—3. It is really a continuation of the present road. I would like to have the continuation of the Somerville road along the south side of the track. I have property east of the present Camp Lane Road. My [fol. 172] objection would be met if the proposed change of Camp Lane road were to start somewhere near the elbow of the present Camp Lane road and go to about 200 ft. south of the railroad. The Lumber Company and myself are the users of this road.

N. Goodkind (on Behalf of the Railroad Company)

I am Bridge Engineer of the State Highway Department. Our improvement, either side of this railroad crossing, indicates acquisition of sufficient property to obtain a 66 ft. right of way and the amount purchased from property owners adjoining the railroad indicates that the existing lines, the existing right of way is taken at 33 ft.; that in the existing right of way of the old road before the highway

improvement was 33 ft. at the point where it crosses the railroad. We are acquiring 33 ft. of new or additional width.

(Hearing Continued March 17, 1927)

GEORGE C. DIEHL (on Behalf of the Railroad Company)

I reside at Buffalo, N. Y. and am a Highway (Civil) Engineer. For 32 years I have been connected with the State Highway Department of the State of New York—ever since the passage of the first highway bills,—and intimately connected with the operations of that department. At one time I was consulting engineer for the department. For the last 20 years I have been County Engineer for Erie County which is the largest county in the State of New York, making the largest expenditures for highways in the State. I have been practicing the engineering profession for 32 years. I have been consulting engineer for upwards of 100 different municipalities. For 12 years I headed the National Road Movement of the American Automobile Association and made a study of highway conditions in each state of the United States. I have had a good deal to do with the improvement of highways and the elimination of [fol. 173] grade crossings generally, and particularly since the advent of the automobile. I have examined the plan which the railroad has proposed for the elimination of this crossing at Royce Valley and have in mind the general scheme for the elimination and how the highway is to be diverted. I have personally inspected the location. A curve of 6 degrees such as here proposed is not dangerous and does not decrease the facilities for traveling. I have made a direct study of 356 railroad crossings at grade in Erie County and a considerable number of crossings, elsewhere in New York State. I have directly supervised the building of 2,000 miles of road, in Erie County, and some 8,000 to 10,000 miles elsewhere. During the past 7 or 8 years I have made an intensive study, thru actual tests and experiments, to determine what degree of curvature would be dangerous and would curtail traffic. Without endeavoring to give a description of all of these various tests, the

conclusions that have been arrived at are: that in the vicinity of large centres of population on highways of 2 lanes and upwards a degree of curvature of 1,000 ft. radius, which is practically the same as the 6 degree, so-called, railroad curve, is the limit of curvature beyond which there is no increased danger of diminution of capacity. In highways remote from cities, on 2 lane highways, the accepted standard which we have adopted after these observations, experiments and tests, have been 600' radii, which is about equivalent to a 10 degree curvature. As a result of the tests, which have been conducted by me personally and by my men in my employ, we have found that this degree of [fol. 174] curvature does not create any great difference from a straight road and does not in any way decrease the capacity for vehicles to pass over the highway. It is very usual for vehicles driving along a highway which is perfectly straight to describe arcs equivalent to a 6 degree curvature. A vehicle such as an automobile does not follow a straight narrow line like a railroad train on a straight track, it passes along the highway, not in a perfectly straight line, but in a series of bends and curves, being at one time on one side of the lane of travel, another time on the other side, turning out for vehicles and things of that sort. It isn't at all unusual for vehicles on a perfectly straight road to be operated on arcs which have a radius of 1,000 ft. I have found it advisable to take into account the question of economy in dealing with these situations. That is the basis of the improvements; the basis of all improvements in any transportation line—be it steam, water, air or highway transportation line. The question of the justification of any expenditure depends largely on the cost per mile, and in practically every instance where we have constructed a highway, whether it has involved the elimination of a grade crossing or not, careful consideration has been given to the amount of travel and the justification for the expenditure. In other words, we have adopted the slogan that highway dollars must pay their way and should not be squandered in construction of roads or building for highway travel, anymore than it should be for the construction of any other means of transportation. The one great element of the cost was the element of the highway itself, the economical justification for the expenditure and the purpose

which it is intended to accomplish by such expenditure. It [fol. 175] has been found to be proper practice in country and rural districts to permit curves of even greater degrees of sharpness than 6 degrees. 10 degrees has been the generally adopted standard for rural sections and this degree of curvature has been used by the State Highway Department and other political subdivisions which have control of highway funds. I know of instances in heavy traffic where a curve of 1,000 feet radius has been permitted to remain where there are as many as four lines of traffic. I am familiar with the highway known as Broadway in the vicinity of Buffalo, testified to by one of the witnesses (Vanneman). I laid it out, prepared the plans and supervised its construction. It is the most important highway crossing in the State of New York from east to west—known as State Road #7. There are two main state roads crossing the central part of the state from Buffalo to Albany. This is one of them. The other is Main Street, leading out of the City of Buffalo. Sometime ago, the Board of Supervisors, with whom I am connected, made application to the Public Service Commission of New York for the separation of grades. This highway crosses the Erie and the Lehigh Valley Railroads at an angle of about 25 degrees and presents a very unsafe condition. The highway was perfectly straight at these crossings, studies were made with a view of keeping the highway straight and also with a view of reducing or increasing the intersecting angle of highway and railroad to 45 degrees. After a most careful consideration and a study by all of the various political subdivisions the introduction of 1,000 ft. radii was made with a view of crossing the railroads at an angle of 45 degrees, thereby greatly reducing the cost—almost cutting it in half—of [fol. 176] the installation, and in the opinion of those of us who were representing the public in the various subdivisions this change added no additional danger or diminution of capacity. It provided for 4—10 ft. lanes.

If the total cost of a project were in the vicinity of $300,000, I would say that if the introduction of a 1,000 ft. curve would result in economy to the extent of $100,000 or more dollars, it ought to be considered. The saving should depend somewhat on the total cost of the project and also on the difference in results, and regarding the length of the

roadway and things of that sort. But as compared with a hypothetical crossing, similar to this crossing in question, I would say that if the introduction of such curve would result in economy to the extent of $100,000 or more dollars in the project it ought to be considered.

In my opinion the introduction of a curve such as is contemplated in the plan here proposed by the railroad company would not be in any degree more dangerous than a perfectly straight road.

The pillars in the middle of the road in the underpass would be as much of an obstruction on a straight road as they would be on a curved road. Thru these innumerable tests we have made, we find that an automobile can be driven with the same degree of safety on a curve of 1,000 ft. radii as it can on a straight track. In this particular case the pier is on the straight section of the road and not on the curved section. The curve is some 100 or 200 ft. back from the pier and in my opinion the pier would be equally dangerous on a straight track.

[fol. 177] As regards the obstruction of view a curve would give a better view of the road than if it was on a perfectly straight track. The view had on a slight curve is better than when traveling straight, particularly if there happens to be a large truck or something of that sort ahead of the driver. This is a 1,000 ft. curve. If you were driving an automobile you are sitting behind the driver's wheel looking ahead for vehicles on the road, both traveling in the same direction and traveling in the opposite direction on the lane. If a large vehicle is directly in front of you it obstructs your view to a greater extent on a straight track; if there is a vehicle in front of the vehicle on the lane approaching you. But if there is a slight curve you get a better view of the vehicle approaching you than you would on a perfectly straight track, if there are any large truck in front of you. This is based on vehicles being in front. Of course if there are no vehicles in front of you you get a clear unobstructed view beyond question.

Nobody would make a statement that you could see thru a railroad embankment to observe cars approaching on a curve on the other side, but beyond a certain point there isn't any particular necessity for seeing. For instance,

when I am driving an automobile I don't care what is a 1,000 ft. ahead of me, but my most vital concern is what is 200 or 300 ft. ahead of me. I say these curves will not curtail traffic in any way. On a 1,000 ft. curve I would advocate running at exactly same speed on all kinds of weather, whether it was raining or snowing, as on a straight line. I do it every day. On this particular curve and under the conditions proposed I would advocate approaching this underpass at the same speed as if I were [fol. 177a] on a perfectly straight road and had a perfectly straight road ahead of me.

On Broadway we had a straight road and we introduced 2-1,000 ft. curves, in order to cross the railroad at a less acute angle. On all roads we have some 1,000 ft. curves. At the crossing at Broadway the old road was perfectly straight as this one. The road was straight and we put in curves. If a road is straight I would not advocate introducing a curve unless there was a good and sufficient reason, but if there was I wouldn't keep it straight. The difference in cost is a good and sufficient reason. If the curves curtail traffic or weren't safe I wouldn't think you were justified in saving the cost. The reason in each of the cases I have spoken of for putting in curves was the difference in cost. That is the reason, generally speaking, for all curves in all transportation lines, with some minor exceptions. We are doing exactly what you are doing in New Jersey, spending a lot of money to eliminate curves on highways, but not curves having a radius of 1,000 ft. What we are eliminating are the ones which are sharper than 1,000 ft. and introduce danger or a diminution of the capacity of the roads. I have in my office this moment a project for the elimination of at least 100 curves and I also have a project for the introduction of curves of 1,000 ft. radius. It must be perfectly apparent to anyone who operates an automobile that there is a certain degree of curvature when the condition is the same as it is on a straight track up to 40 or 45 miles an hour. We have endeavored to ascertain what that point is. We don't spend one cent in the State of New York—and I don't think you do in New Jersey—to eliminate curves of 1,000 ft. or more [fol. 178] and the curves, in the meantime that are dangerous we are spending a great deal of money to eliminate.

If you couldn't see half a mile ahead on account of obstructions to view, a curve shouldn't be eliminated, whereas we can assume that travel at the rate of from 40 to 45 miles an hour on a highway ought to be maintained, because the conditions of economical highways are that they must be conducive to speed and safety. A car running 40 or 45 miles an hour can be brought to a stop in a distance in less than 200 or 225 ft. That would be the average car and the average driver.

If the highway is properly cleared of snow, as this highway is, large snow embankments is not an element, in considering the difference between a straight road and a curve. Of course, it is perfectly obvious to everyone that when snow and ice are on the ground, you can't maintain the rate of speed on the highway that you could when conditions are right. It is slowed down whether it is on a curve or whether the road is straight, on account of ice and snow conditions. I keep 500 miles of road clear of snow and we have it organized with the various appliances so as to maintain continuous highway traffic. That is a part of our job in Winter and Summer. The fact that snow and ice decrease the capacity of the highway doesn't alter the relative conditions as between a straight road and a 1,000 ft. radius curve. If a 6 degree curve was fenced in with a solid board fence you would be able to see 250 ft. ahead of you in your own lane—a 10 ft. lane. I would recommend a straight away section, on each side of the railroad crossing of at least 100 ft. When they speak of a 500 ft. tangent under the crossing, 250 ft. on each side, that is what they think is an ideal condition, but we have had the Public Service Commission (New York) [fol. 179] approve plans for us where we have had 100 and 150 ft. tangent. If you could get 250 ft. it wouldn't do any harm, but it wouldn't do enough good to warrant any large expenditure. If it wouldn't warrant extra expenditure, I would say, "Yes, make it 250 ft. if there wasn't any particular expenditure involved."

F. W. Remsen (on Behalf of Montgomery Township)

I am director of the Board of Freeholders of Somerset County and have held that office for 17 years, during which

time I have had to do with highway construction in Somerset County. I am familiar with as much of State Highway Route #16 as lies in Somerset County. It enters Somerset County on the north at Van Doren's Mills, northeast of Bernardsville about 3 miles from the crossing and on the south on the Cherry Valley road near Rocky Hill. The length of that road in Somerset County is approximately 31 miles. Several curves on this route have been eliminated. The first one is near Van Doren's mills, eliminated the curve near the corner what is known as Gladstone Corner, northeast of Bernardsville. The next one is at a point south of the Village of Bedminster, where a slight curve was eliminated. The next one is north of the Village of Pluckimin, where a curve was straightened. The next one is north of Somerville, near the farm of J. S. Frelinghuysen and the property of William Watt. There, two dangerous corners were eliminated. Then a notable case is at Harlingen which is south of his particular location. There two dangerous corners and one curve were eliminated by a road which was almost placed on a straight [fol. 180] line. I have observed the policy of the highway commission in the construction of these roads to eliminate curves wherever possible. I know of no instance where curves have been placed in the road which was otherwise straight.

I am familiar with the location where this particular location is proposed. A new proposed highway system is embodied in a bill recently introduced by Senator Larson, which creates a new highway route from Lambertville to Ringoes, to Woods Tavern, to Bound Brook, to Warrenville. Woods Tavern is 3 miles south of this crossing. If that highway is constructed it is not absolutely necessary to take the traffic over route #16 and thru the proposed undercrossing, in order to get from Woods Tavern to Bound Brook, but the conditions point to the fact that it will come thru this underpass. It will add very much to the traffic conditions on the whole of route #16 at this point. In order to get from Woods Tavern to Bound Brook it would be necessary to get over or under the Lehigh Valley railroad. There are but 2 main crossings, one at Manville, further east than this present location.

That is in a very much more thickly settled part of the country than this proposed underpass. The conclusions anyone would draw, knowing the territory about these locations, would be that the traffic from the new highway from Lambertville and Ringoes and Woods Tavern would come through route #16, under this particular spot in question. The crossing at Manville is a grade crossing. Members of the Board of Freeholders attended hearings before the State Highway Commission and the Public Utilities Commissioners for over 2 years now, because of the public sentiment of the people of Somerset County to have this underpass put in a straight line rather than have a curve thrown into what would otherwise be a straight highway. The Board of Freeholders have been [fol. 181] fighting to keep this straight line in. Public sentiment in Somerset County is very much for the straight line.

I do not think it is a safe and practical plan to put this curve in this highway at this point as proposed by the Lehigh Valley Railroad.

When I referred to the elimination of curves in State Highway Route #16, perhaps I might better have said, "reduced" that is what I meant.

The only bridge of any size whatever on route 16 is the bridge over the Raritan River south of Somerville, which crosses the stream very nearly at right angles. The curve on the approach of that bridge was improved very little, if any.

F. C. Yoorse (on Behalf of Montgomery Township)

I reside in the vicinity of the proposed underpass and am familiar with route #16 at that location. There is a curve in the highway as you approach the crossing going from south to north, about ¼ of a mile from the crossing to the school house, toward the Liberty School. The degree of this curve is 6°. I have known of 2 accidents happening there, one on March 10, 1927. A car stopped at the school house and picked up a passenger and went to turn around to go back toward the south when a driver going north couldn't see him around the curve and struck

him. Near the property of Fred Kaiser the curve in the old highway was eliminated in the construction of the new highway. This curve was about 6%.

[fol. 182] C. A. Chammer (on Behalf of Montgomery Township)

I own property which will be affected in value by the proposed change in route 16. My property is used as a store which would be off the road altogether. Another piece of property would be shoved between me and the state highway. If the state highway would stay where it is at the present time and somebody would offer me $20,000, I would not sell the property. If the state highway goes the way it is proposed by the Lehigh Valley Railroad, I guess my property is worth nothing, or it would come down to a few hundred dollars for the property, and the main thing is the business would be gone, as far as I can see, as a business man, and studying it for 2½ years since I am there.

W. R. Ervs (on Behalf of Montgomery Township)

I am in the lumber and coal business, and I live in South Somerville within a few hundred yards of the proposed undercrossing. This is my 11th year in the lumber business. I am more or less familiar with real estate values there.

W. M. Wright's property is in the immediate vicinity of this underpass. I should think this proposed change would damage his property to the extent of one half at least. I do not know what his acreage is. I am familiar with the house and property generally. If this proposed change is made he will be cut off from the highway and would have to find access to the highway through other property. He could use the present highway. He would not be cut off from that.

[fol. 183] W. R. Johnston (Recalled)

The railroad property at this crossing is in the neighborhood of 240 ft. wide. The right of way is 50 ft. from the centre line on each side, that is, 100 ft. wide. The proposed entrance of Camp Lane to the state highway would be about 200 ft. from the railroad property line on the south side of the track.

Grosse Hill (on Behalf of Hillsboro Bd. of Education)

I am President of the Board of Education of Hillsboro Township. I have been on the Board for 17 years and have served a number of years as President. The nearest school in my District to this passage is high school known as Liberty School, located about ¼ of a mile south of the railroad track. Scholars in this district attend this school from as far as the Raritan River, north of the track adjoining the borough of Somerville, distant 2 miles. We have scholars crossing and recrossing this road from the north side to the Liberty School House. There are scholars crossing from the north side of the track over to the north side. Just at the present time all the high school children as the rest of the entire township are in the Somerville high school, except the schools at Manville. They are transported in a bus from the south side to Somerville twice a day every school day. Parents of the school children have appealed to me in this matter, to use my influence to keep this straight. I don't feel that it is safe for children to pass and repass on a curve, as shown by the map, as proposed to be made. I refer to passing in a bus because it gets slippery in the winter time and we all know they skid. We had one penned up last winter with 31 children in it. Next year we will have to have [fol. 184] other busses. We need two. In the same way it is growing greater all the time, the number of children. I consider that it is absolutely unsafe. It is the smaller children, from the eighth grade down, that walk from the north side to the Liberty school on the south side of the railroad. The greater area of the school district is north

of the crossing. I do not know whether the number of students attending school from that section is the largest. It is my opinion that it would be more dangerous for children to walk to school thru the underpass on this curve than to walk thru the underpass on the straight highway. My experience is that all traffic cuts corners and they will cut corners here. None of the children attending Liberty School are taken by bus; they walk.

W R Johnston (Recalled)

My revised plan provides for the same sidewalk and roadway space as Mr. Mead's plan. This revision is in the estimate but not shown on the plan. It includes the same dimensions for sidewalks and highway.

[fols. 185-185a] District Court of the United States of America, District Court of New Jersey

I, George T. Cranmer, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit Court, do hereby certify that the foregoing is the statement of the evidence filed herein as a part of the record on appeal in the above stated cause.

In witness whereof, I have hereunto subscribed my *my* name and affixed the seal of this court at Trenton, in said district, on this Seventh day of March 1928

George T. Cranmer, Clerk, District Court of the United States, by Charles S. Chevrier, Deputy. (Seal District Court of the United States, District of New Jersey.)

[fol. 185b] [File endorsement omitted]

[fols. 186 & 187] IN SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 24

(On Appeal from Interlocutory Decree)

October Term, 1928

No. 54

(On Appeal from Final Decree)

STIPULATION RE ARGUMENT—Filed March 12, 1928

It is hereby stipulated and agreed that both of the foregoing appeals be argued together upon the record in case number 722, and that the opinion of the District Court filed in this cause on June 28, 1927, which is included in the record in case number 630, be incorporated and printed in the record of case number 722.

Geo. S. Hobart, Duane E. Minard, Solicitors for Plaintiff-Appellant. John O. Bigelow, Solicitor for Defendant-Appellees.

February 3, 1928.

[fol. 188] [File endorsement omitted.]

[fol. 189] IN SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1928

No. 24

STATEMENT OF POINTS RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 30, 1927

Comes now the appellant, Lehigh Valley Railroad Company, and pursuant to the rules of this Court, makes the

following definite statement of the points on which it intends to rely and of the parts of the record which it thinks necessary for the consideration thereof:

Statement of Points

1. The order of the Board of Public Utility Commissioners described in the Petition of Appeal violates the commerce clause of constitution of the United States, (Art. I, Sec. VIII, Paragraph 3) and the Act to Regulate Commerce (Secs. 13 and 15a) in that it

(a) requires the appellant to make unreasonable expenditures for structures,

(b) imposes unreasonable or arbitrary requirements or burdens upon, interference with, impediment of or discrimination against the interstate and foreign commerce, of the appellant, and impairs the usefulness of its facilities therefor.

2. The statute of New Jersey, entitled "A supplement to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty first, one thousand nine hundred and eleven" (N. J. P. L. 1913, p [fol. 190] 91), and the Act to which the same is a supplement, (N. J. P. L. 1911, p. 374), as amended, under authority of which said order was made, as construed by the Court below as authorizing said order, violate said commerce clause of constitution of the United States, (Art. I, Sec. VIII, Paragraph 3) and said Act to Regulate Commerce (Secs. 13 and 15a) in the respects stated in Point 1.

3. Said order violates the Constitution of the United States (Art. I, Sec. X, Paragraph 1.) by impairing the obligation of the contract shown by the record herein to have been made between the appellant and the State Highway Commission of New Jersey for the elimination of the grade crossing referred to in the Petition of Appeal.

4. Said statutes, as so construed, violate said Constitution of the United States (Art. I, Sec. X, Paragraph 1), in the respect described in Point 3.

5. Said order violates the due process and equal protection clauses of the Constitution of the United States (Art. XIV, Sec. 1) in that it

(a) constitutes an unreasonable exercise of the police power by requiring an unreasonable expenditure for the elimination of said crossing and thereby deprives the appellant of its property without due process of law

(b) confiscates the property of the appellant for the benefit of others,

(c) deprives the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of *such* tribunal as to both the law and the facts, the issue of confiscation.

6. Said statutes, as so construed, violate said due process and equal protection clauses of the Constitution of the United States (Art. XIV, Sec. 1) in the respects stated in Point 5.

7. Said order violates Article VI, Section II of the Constitution of the United States in that it is contrary to such provisions of said constitution as are mentioned in Points [fol. 191] 1, 3 and 5, and is contrary to the provisions of Sections 13 and 13a of the Act to regulate commerce, which is a law of the United States made in pursuance of said constitution.

8. Said statutes, as so construed, violate Article VI, Section II of the Constitution of the United States in the respects stated in Point 7.

9. The court below erred, for the reasons above specified in the preceding eight points, in refusing to grant an interlocutory injunction as prayed in the bill of complaint.

10. The court below erred, for the reasons above specified in Point 5 and 6, in denying the appellant's petition for rehearing.

Parts of the Record

Petition of Appeal and Allowance of Appeal.
Assignment of Errors.
Citation.

Praecipe.
Opinion of District Court.
Interlocutory Decree.
Bill of Complaint.
Exhibit "A" annexed to bill of complaint, P. U. C. Order, April 26, 1927, and plan adopted by the Board;
Affidavit of Duane E. Minard, of May 31, 1927.
Affidavit of William R. Johnston of May 31, 1927.
Exhibit "A" annexed to Johnston affidavit, May 31, 1927 (order of November 24, 1926)
Exhibit "B," Board's decision.
Exhibit "C," plan "C."
Order to show cause.

Supplemental Affidavits and Exhibits

Affidavit of William R. Johnston, June 2, 1927.
Exhibit "D," schedule of highway courves.
Exhibit "E," Record and minutes of State Highway Commission, respecting State Highway Route No. 16. [fols. 192 & 193] Exhibit "F," Plan "C" as signed by the parties. (Consisting of six blueprint sheets.)
Exhibit "G," Camp Lane Plan.
Exhibit "H," Board's profile.
Exhibit "I," Railroad estimate.
Exhibit "J," Mead's estimate.
Affidavit of George T. Hand.
Affidavit of C. E. Hildum.
Affidavit of Charles R. Vanneman.
Affidavit of Walter Steele.
Affidavit of George C. Diehl.
Exhibit "K"—Record of Laying Out State Highway Route No. 16.

Affidavits and Exhibits for the Defendants

Affidavit of Charles F. Bedwell, June 8, 1927.
Affidavit of A. Lee Grover, June 10, 1927.
Affidavit of Charles A. Mead, June 8, 1927.
Affidavit of H. P. Brainard, June 9, 1927.
Affidavit of Alfred N. Barker, June 9, 1927.
Supreme Court opinion.

Supreme Court Order, June 6, 1927, denying application for writ of certiorari.

On Petition for Rehearing

Petition for rehearing.
Defendants' answer to petition for rehearing.

* * * * * * *

Clerk's certificate to transcript of record.

Geo. S. Hobart, Duane E. Minard. Hobart & Minard, Solicitors for Plaintiff Appellant.

November 28, 1927.

[fol. 194] [File endorsement omitted.]

[fol. 195] In Supreme Court of the United States,
October Term, 1928

No. 54

Statement of Points Relied Upon and Designation of Parts of Record to be Printed. Filed January 27, 1928

Comes now the appellant, Lehigh Valley Railroad Company, and pursuant to the rules of this Court, makes the following definite statement of the points on which it intends to rely and of the parts of the record which it thinks necessary for the consideration thereof:

Statement of Points

1. The order of the Board of Public Utility Commissioners described in the Petition of Appeal, the statute of New Jersey, entitled "A supplement to an act entitled 'An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers,' approved April twenty first, one thousand nine hundred and eleven," approved March 12, 1913, (N. J. P. L. 1913, p. 91), and the Act to which the same is a supplement,

(N. J. P. L. 1911, p. 374), as amended, under authority of which said order was made and which were construed by the New Jersey Supreme Court and the Court below as authorizing said order, violate the commerce clause of the Constitution of the United States, (Art. I, Sec. VIII, paragraph 3), and an Act to Regulate Commerce (Secs. 13 and 15a), in that they, and each of them,

(a) require the appellant to make unreasonable expenditures for structures, and

[fol. 196] (b) impose unreasonable or arbitrary requirements or burdens upon, interference with, impediment of or discrimination against the interstate and foreign commerce, of the appellant, and impair the usefulness of its facilities therefor.

2. Said order and statutes, as so construed, and each of them, violate the Constitution of the United States (Art. I, Sec. X, paragraph 1,) by impairing the obligation of the contract shown by the record herein to have been made between the appellant and the State Highway Commission of New Jersey for the elimination of the grade crossing referred to in the Petition of Appeal.

3. Said order and statutes, as so construed, and each of them, violate the due process and equal protection clauses of the Constitution of the United States (Art. XIV, Sec. 1) in that they

(a) constitute an unreasonable exercise of the police power by requiring an unreasonable expenditure for the elimination of said crossing, and thereby deprive the appellant of its property without due process of law,

(b) confiscate the property of the appellant for the benefit of others, and

(c) deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.

4. Said order and statutes, as so construed, and each of them, violate Article VI, Section II of the Constitution of the United States in that they are contrary to the pro-

visions of said Constitution mentioned in Points 1, 2 and 3, and are contrary to the provisions of Sections 13 and 15a of the Act to regulate commerce, which is a law of the United States made in pursuance of said Constitution.

[fol. 197] 5. The court below erred, for the reasons above specified in the preceding four points, in refusing to grant a permanent injunction, as prayed in the bill of complaint, and in dismissing said bill of complaint.

6. The court below erred in denying the appellant's motion to strike out the affirmative defense set up in Part II of the answer, on the ground that said affirmative defense is insufficient in that it fails to state a good defense to the allegations of the complaint.

Parts of the Record

Petition of Appeal.
Order allowing appeal and supersedeas.
Assignment of Errors.
Citation.
Praecipe.
Final Decree.
Bill of Complaint and Exhibits Annexed Thereto
Bill of Complaint, and
Exhibit "A" annexed to bill of complaint, P. U. C. Order, April 26, 1927, and plan adopted by the Board;
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Affidavit of William R. Johnston of May 31, 1927.
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Exhibit "B," Board's decision.
Exhibit "C," plan "C."

[fol. 198] Supplemental Affidavits and Exhibits

Affidavit of William R. Johnston, June 2, 1927.
Exhibit "D," schedule of highway curves.
Exhibit "E," Record and minutes of State Highway Commission, respecting State Highway Route No. 16.
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Exhibit "G," Camp Lane Plan.
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Affidavit of George C. Diehl.
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Affidavits and Exhibits for the Defendants

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Affidavit of Charles A. Mead, June 8, 1927.
Affidavit of H. P. Brainard, June 9, 1927.
Affidavit of Alfred N. Barber, June 9, 1927.
Supreme Court opinion.
Supreme Court Order, June 6, 1927, denying application for writ of certiorari.
Answer of defendant, Board of Public Utility Commissioners.
Notice of motion to strike out the affirmative defense set up as Part II, of the answer.
Stipulation continuing argument of said motion until final hearing.
Stipulation of the Record on Final Hearing.
Testimony taken before the Board of Public Utility Commissioners.

[fols. 199 & 200] The following additional exhibits offered at the hearing before said Board:

(a) Exhibit C 4, a composite of 16 photographs, 8 of the crossing on State Highway Route #16 and 8 of the crossing on Camp Lane.

(b) Exhibit C 5, Traffic Count at the crossing on State Highway Route #16.

(c) Exhibit C 6, State Geological Survey Map, Somerville Sheet, (being the same as "Exhibit 1, Montgomery Township" and "Exhibit 2, Montgomery Township").

(d) Exhibit S-1, Report of Thomas J. Wasser.

Verified statement of C. E. Hildum, dated January 10, 1928, of net Railway Operating Income up to November 30, 1927. (Exhibit "L.")

Clerk's certificate to transcript of record.

Geo. S. Hobart, Duane E. Minard, Solicitors for Plaintiff-Appellant.

January 24, 1928.

[fol. 201] [File endorsement omitted.]

Endorsed on cover: File No. 33,174. New Jersey D. C. U. S. Term No. 54. Lehigh Valley Railroad Company, appellant, vs. Board of Public Utility Commissioners, Joseph F. Autenrieth, Frederick W. Gnichtel, et al. (Vide 24.) Filed Jan. 27, 1928. File No. 33,174.

(1711)

Office Supreme Court, U. S.
FILED
SEP 27 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 24.

LEHIGH VALLEY RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members, &c., *et als.*,

Defendants.

Filed November 25, 1927. (File No. 33,082.)

No. 54.

LEHIGH VALLEY RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members, &c., *et als.*,

Defendants.

Filed January 27, 1928. (File No. 33,174.)

Appeals from the District Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANT

E. H. BURGESS,
GEORGE S. HOBART,
DUANE E. MINARD,
Counsel for Appellant.

Arthur W. Cross, Law Printer, 68-70 Lafayette Street, Newark, N. J.

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Public Service Company Act (Pa. P. L. 1913, p. 1374, as amended Pa. P. L. 1915, p. 779), Article VI, Sections 17, 18, 19, 22 and 24	107, 108

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 24.

LEHIGH VALLEY RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members, &c., *et als.*,

Defendants.

Filed November 25, 1927. (File No. 33,082.)

No. 54.

LEHIGH VALLEY RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS, JOSEPH F. AUTENRIETH, FREDERICK W. GNICHTEL, CHARLES BROWNE, as members, &c., *et als.*,

Defendants.

Filed January 27, 1928. (File No. 33,174.)

Appeals from the District Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANT

THE OPINION OF THE COURT BELOW.

The opinion in the District Court of the United States denying an interlocutory injunction is unreported. (R. 13.) On final hearing the bill of complaint was dismissed without further opinion.

JURISDICTION OF THIS COURT.

—1—

The date of the judgment under review is January 18, 1928 (R. 1).

—2—

The specific claims advanced, and the rulings made, in the District Court, relied upon as the basis of this Court's jurisdiction, are as follows:

The appellant filed its bill of complaint on June 1, 1927, praying for an injunction against the enforcement of an order of the Board of Public Utility Commissioners of New Jersey, for the elimination of certain grade crossings; the grounds for the injunction as set forth in the bill, insofar as they involve questions under the Federal Constitution and statutes, are:

Said order—

(a) Imposed upon the appellant (plaintiff below) a necessity for unreasonable expenditures for structures and maintenance of way in violation of Paragraph 2, Section 15a of the Act to Regulate Commerce as amended by the Transportation Act of 1920 (R. 26).

(b) Imposed upon the interstate commerce of the appellant an unreasonable and arbitrary requirement and constituted a direct interference with its commerce among the states and imposed a direct burden upon and impediment of said interstate commerce and created a discrimina-

tion against interstate commerce and otherwise impaired the usefulness of its facilities for such commerce in violation of Article 1, Section 8, Paragraph 3 of the Constitution and of the Act to Regulate Commerce as amended by the Transportation Act, 1920 (R. 27).

(c) Was an unreasonable exercise of the police power and thereby deprived the appellant of its property without due process of law in violation of the Fourteenth Amendment (R. 27).

(d) Confiscated the property of the appellant for the benefit of other persons and took its property for public use without just compensation, and denied to the appellant the equal protection of the laws and impaired the obligation of a contract between the appellant and the State of New Jersey (R. 27).

All these claims were overruled by the District Court in its opinion filed June 28, 1927 (R. 13).

After the filing of the opinion and before the entry of the order denying the interlocutory injunction, the appellant, on July 15, 1928, filed a petition for rehearing (R. 104) wherein it directed the Court's attention to the allegations of the bill of complaint, affidavits, and exhibits that the appellant's application to the Supreme Court for a writ of certiorari (which is the only method of review provided by the statutes of New Jersey) to review said order of the Board had been denied (R. 98), and that a renewal of that application before the New Jersey Supreme Court *in banc* had also been denied (R. 102); and then asked for the consideration of the decision of this court in the case of *Ohio Valley Water Company* v. *Ben Avon Borough* (253 U. S. 287).

In said petition the appellant set forth the following claims under the 14th Amendment (R. 106).

I.

The denial by the New Jersey Supreme Court of a review of said order of the Board of Public Utility Commissioners deprived the appellant of its property without due process of law, in that thereby the appellant was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order confiscates the appellant's property.

II.

The statutes of the State of New Jersey under the authority of which said order was made (specifically named in said petition) deprived the appellant of its property without due process of law, in that thereby the appellant was deprived of the right to a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order confiscates the appellant's property.

The appellant in said petition claimed that the denial by the New Jersey Supreme Court of its application to review said order, and that the statutes of the State of New Jersey, as construed by the courts of that state, deprived the appellant of due process under the Fourteenth Amendment, as alleged in the complaint, in that by said denial the appellant was refused any opportunity to submit to a judicial tribunal for determination upon the independent judgment of such tribunal, both as to the law and the facts, the issue whether said order confiscates its property and in that, even if the Supreme Court of New Jersey had allowed a writ of certiorari to review said order, the statutes of said state limited the power of review of said Supreme Court of New Jersey to cases where it clearly appeared that there was no evidence before said

Board to support reasonably the order under review or that the same was without the jurisdiction of said Board.

Thereafter the petition for rehearing was denied and the motion for interlocutory injunction was overruled.

These claims were again overruled by the District Court by the final decree (without further opinion) filed January 18, 1928 (R. 1).

Pending the final hearing, which was had on January 18, 1928, an appeal was taken to this court from the order denying the interlocutory injunction; and same was placed on the calendar as Case No. 630 for the October term, 1927 (No. 24 at the present term). But before this appeal was reached for argument the case came on for final hearing in the District Court. It was, therefore, stipulated that the appeal from the order denying the interlocutory injunction should be argued upon the record of the appeal from the final decree, including said opinion of the District Court (R. 213).

An order allowing an appeal from the final decree of the District Court (with supersedeas) was made January 18, 1928 (R. 3).

— 3 —

The jurisdiction of this Court is invoked under Section 380, United States Code (Jud. Code, Sec. 266, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938).

— 4 —

The following cases sustain the jurisdiction of this Court:

Oklahoma Nat. Gas Co. v. *Russell*, 261 U. S. 290; 67 L. Ed. 659;

Prendergast v. *New York Tel. Co.*, 262 U. S. 43; 67 L. Ed. 853;

Louisiana Public Service Com. v. *Morgan's L. T. R. R. & S. S. Co.*, 264 U. S. 393; 68 L. Ed. 756;

Michigan Public Utilities Comm. v. *Duke*, 266 U. S. 570; 69 L. Ed. 445;

Western & Atlantic R. R. v. *Georgia Public Service Com.*, 267 U. S. 493; 69 L. Ed. 753;

Banton v. *Belt Line Ry. Co.*, 268 U. S. 413; 69 L. Ed. 1020;

Board of Public Utility Coms. v. *New York Tel. Co.*, 271 U. S. 23; 70 L. Ed. 808;

Missouri, etc., Ry. Co. v. *Oklahoma*, 271 U. S. 303; 70 L. Ed. 957.

In re Buder, 271 U. S. 461; 70 L. Ed. 1036;

Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317; 71 L. Ed. 273;

Interstate Busses Corp. v. *Holyoke Street R. Co.*, 273 U. S. 45; 71 L. Ed. 530;

Smith v. *Wilson*, 273 U. S. 388; 71 L. Ed. 699;

Morris v. *Duby*, 274 U. S. 135; 71 L. Ed. 966;

Clark v. *Poor*, 274 U. S. 554; 71 L. Ed. 1199;

Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588; 71 L. Ed. 1219.

Ex Parte Williams, U. S. Adv. Op. of June 15, 1928, p. 591; 72 L. Ed.

STATEMENT OF THE CASE.

There are two appeals from the District Court of the United States, for the District of New Jersey, [sitting as a statutory court under Section 266 of the Judicial Code, (Sec. 380, U. S. C.)]:

1. Appeal filed November 25, 1927, from an interlocutory decree entered August 10, 1927, denying an interlocutory injunction;

2. Appeal filed January 18, 1928, from a final decree, filed that day, dismissing the bill of complaint (R. 1).

By stipulation these appeals were merged for argument on the record of the second appeal (R. 213) (including the opinion of the District Court filed June 28, 1927 (R. 13).

Parties and Subject Matter.

Appellant is a citizen and resident of Pennsylvania, incorporated under the laws of that State and engaged in the operation of a steam railroad in and through the states of Pennsylvania, New York and New Jersey (R. 21, 22). The defendants who appeared and answered are the members of the Board of Public Utility Commissioners of the State of New Jersey.

The suit was brought to enjoin the enforcement of an order of said Board (Exhibit "A," R. 115) directing appellant to alter two grade crossings, one on a highway known as Camp Lane and the other on a highway known as State Highway Route No. 16, according to a plan annexed thereto and made a part thereof (R. 116). (Part of Exhibit "A," map between R. 116 & 117).

The Physical Situation.

The physical situation is shown on a composite map annexed hereto as Appendix "C."

Route No. 16 of the Highway System of the State of New Jersey crosses the railroad of the appellant, in a general direction of northeasterly and southwesterly, at grade in the Township of Hillsborough, Somerset County, N. J., at an angle of 29 degrees with approaches on either side at the grade of substantially five per cent. for a distance of 125 feet from the tracks. The railroad right-of-way at this crossing is 100 feet wide and is occupied by four main operating tracks and various railroad appurtenances including a freight and passenger station, milk platform, weighing scales and driveways.

The legal width of said Highway Route No. 16 at and in the vicinity of said crossing is 33 feet (Exhibit "K," R. 159, l. 29; 36, 201) and the traveled portion of said highway throughout its distance is an average of 20 feet wide, including an improved modern pavement 18 feet wide (R. 36). This highway was formerly a county road of the County of Somerset and was taken over by the State Highway Commission by resolution adopted April 20, 1920 (Exhibit "E," R. 130-135), pursuant to Section 3 of the State Highway System Act (Chap. 220, P. L. 1919, p. 511), and was created State Highway Route No. 16 (between Morristown, in Morris County, and Trenton in Mercer County) by an Act of the Legislature passed the same year (P. L. 1920, pp. 221, 222).

At a point about 1,400 feet easterly of the grade crossing of Highway Route No. 16 there is another road, known as Camp Lane Road, which branches off the Highway Route No. 16 at a point 1,220 feet north of the railroad tracks and runs in a southeasterly direction across said railroad at a practically level grade crossing (R. 36).

History of Proceedings.

Negotiations with Highway Commission.

Before the Board initiated its proceedings the appellant and the State Highway Commission, which has jurisdiction over Highway Route No. 16, the principal highway in question, conducted negotiations and reached an agreement as to all the details of a plan and a contract in writing under which the appellant was to perform the work of eliminating this crossing and bear $40,000 toward the cost thereof; the State Highway Commission paying the balance. Complete general and detailed plans were prepared and signed on behalf of both parties and the appellant began the work, expending thereon approximately $5,000 before the Board made its order of November 24, 1926, initiating the proceeding which culminated in the order complained of.

Proceedings Before the Board of Public Utility Commissioners.

The Board of Public Utility Commissioners of New Jersey, consisting of the three persons named as defendants (R. 22), was created by an Act of the Legislature entitled, "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911 (N. J. P. L. 1911, 374) and exercises certain powers described in said act and its several supplements and amendments.

The Board's authority to order the abolition of a grade crossing emanates solely from a supplement to said act of 1911, approved March 12, 1913 (N. J. P. L. 1913, p. 91) known as the "Fielder Act," printed in full as Appendix "B" of this brief.

Proceedings for the abolition of a crossing at grade may be instituted by petition in writing filed by the board

or body having charge of the finances of the municipality in which the crossing exists, or by the railroad company whose tracks are crossed at grade, or the Board may on its own motion institute such a proceeding.

By its order of November 24, 1926, the Board initiated a proceeding and called a hearing to determine whether the grade crossing in question should be eliminated by substituting a crossing not at the grade of such public highway under or over said railroad or by reconstructing such railroad under or over such public highway, or by vacating, relocating, or changing the lines, width, direction or location of such highway and the opening of a new highway in place of the one ordered vacated. (R. 118, 119).

After hearings, the Board, on April 26, 1927, made its order directing appellant to alter said crossing according to a plan prepared by the Board (Exhibit "A" opp. R. 116) at a cost to the appellant, estimated by the Board's Chief Engineer, of $318,400 (Exhibit "J," R. 156; R 188, 189), afterwards corrected to $324,400, to include detour (R. 44, 93, 124), exclusive of property damages. There being no street railway at the crossing, this entire expense is required by the statute to be paid by appellant. This plan calls for depressing the highway and raising the railroad tracks six inches (R. 188) on their present locations, respectively, and building a bridge to carry the railroad over the highway at an angle of 29° 30', with a twenty foot roadway on each side of a centre pier and additional space for two sidewalks, one on each side (R. 180). The plan also provides for closing a crossing on a highway known as Camp Lane, located 1,400 feet east of Route No. 16 (R. 36), and building a connecting road between the two highways for a distance of 1,940 feet along the southerly side of the railroad (R. 45, 179, 188).

Appellant objected to this plan and offered as a substitute a plan known as Plan "C" (R. 182), which had been

originally prepared and approved by the State Highway Commission (R. 136, 137, 138, 139) (Exhibit "C," R. 129), calling for a relocation of the highway to a point 400 feet east of the present crossing (R. 37), so as to provide a crossing of the railroad at an angle of 54 degrees (R. 183) with an eighteen-foot underpassage on each side of a centre pier and no sidewalk spaces and making no provision for the Camp Lane crossing. The appellant offered to enlarge that plan so as to eliminate Camp Lane crossing as in the Board's plan and to provide a highway undercrossing on Highway Route No. 16, of the same type and construction and having the same dimensions and roadways and sidewalk facilities as the plan proposed by the Board (R. 55, 189, 191, 212). By such relocation of the highway the angle of the crossing is changed from 29 degrees to 54 degrees and the width of the railroad bridge (and length of the underpassage) would be reduced 42 feet (R. 137, l. 18; 138, l. 32), or 47 feet (Wasser, R. 174, at bottom).

The cost is likewise reduced from $324,000, exclusive of property damage, to $205,184.70, including property damages (R. 44, 53, 93, Exhibit "1," R. 153, 155); a difference in cost between the two plans of approximately $120,000 (R. 44, 53). This plan the Board rejected, and ordered its own because the relocation of the highway proposed therein involved the introduction of six degree curves (R. 125, ll. 33-34). The physical differences between the two plans are graphically represented on the composite map annexed hereto as Appendix "C."

Proceedings in the New Jersey Supreme Court.

On May 14, 1927, appellant applied to one of the Justices of the New Jersey Supreme Court for a writ of certiorari (the only means available under the statutes of New Jersey) to review said order of the Board (R. 33). On May 17, 1927, that application was denied, without prejudice,

to a renewal of the application to the Supreme Court *en banc* (R. 33). See opinion 137 Atl. 433 (R. 98).

On May 23, 1927, appellant applied to the New Jersey Supreme Court *en banc* for a writ of certiorari to review said order (R. 33). On May 31, 1927, the Supreme Court denied the application (R. 34) (See 137 Atl. 923) and on June 6, 1927, entered its order accordingly (R. 102).

Proceedings in the District Court.

On June 1, 1927, the appellant filed its bill of complaint in the District Court under Section 266 of the Judical Code, praying for a preliminary injunction pending the return of an order to show cause, an interlocutory injunction pending suit, and a permanent injunction (R. 31) to restrain the enforcement of said order (R. 21-32).

On the filing of the bill an order to show cause was granted, including a preliminary injunction. On June 10, 1927, on the return of said order, a motion for an interlocutory injunction was argued before a statutory court, consisting of one Circuit Judge and two District Judges. On June 28, 1927, this motion was denied (Opinion, R. 13). On July 15, 1927, appellant filed a petition for rehearing (R. 104), which was denied in the interlocutory decree entered August 10, 1927.

The cause was brought on for final hearing, before the same court, on January 18, 1928, and the bill was dismissed, without further opinion (R. 1). On the same day an appeal was allowed, with a supersedeas (R. 3).

SPECIFICATION OF ERRORS.

The following assigned errors are intended to be urged:

First: Said court erred in dismissing the bill of complaint.

And in refusing to grant to the plaintiff a permanent injunction, in accordance with the prayer of its bill of complaint, restraining the defendants and each of them from enforcing the order of the Board of Public Utility Commissioners of the State of New Jersey made on April 26, 1927, directing the plaintiff to alter the crossing known as South Bridge street, or State Highway Route No. 16, by substituting therefor a crossing not at grade of the said public highway; and directing the plaintiff to close the crossing at Camp Lane and to construct a connecting highway therefrom to said State Highway Route No. 16, in the Township of Hillsborough, Somerset County, New Jersey (R. 4).

Second: Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article I, Section VIII, Paragraph 3, reading as follows:

> "The Congress shall have power • • •
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (R. 4).

And in not holding that the said order was in violation thereof (R. 5).

Third: Said court erred in holding that the said order of said Board was not in violation of the Constitution of the United States, to wit, Article I, Section X, Paragraph 1, reading in part as follows:

> "No state • • • shall pass any • • • law impairing the obligation of contracts."

And in not holding that the said order was in violation thereof (R. 5).

Fourth: Said court erred in holding that the said order of said Board was not in violation of the Constitution of the United States, to wit, Article VI, Section II, reading in part as follows:

> "This Constitution, and the laws of the United States, which shall be made in pursuance thereof; • • • shall be the supreme law of the land."

And in not holding that the said order was in violation thereof (R. 5).

Fifth: Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

And in not holding that the said order was in violation thereof (R. 5).

Sixth: Said court erred in holding that said order of said Board was not in violation of the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any State • • • deny to any person within its jurisdiction the equal protection of the laws."

And in not holding that the said order was in violation thereof (R. 5).

Seventh: Said court erred in holding that the said order of said Board did not impose upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance of way in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (2), (3) and (4) of Section 422 thereof, now part of Section 15a of the Act to Regulate Commerce.

And in not holding that said order did impose upon the plaintiff a necessity for unreasonable expenditures

for structures and maintenance-of-way, in conflict with said paragraphs of said "Transportation Act, 1920" (R. 6).

Eighth: Said court erred in holding that the said order of said Board did not create, constitute or impose an unreasonable or arbitrary requirement or burden upon, interference with, impediment of or discrimination against, the interstate commerce of the plaintiff, and did not otherwise impair the usefulness of its facilities therefor, in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (3) and (4) of Section 416 thereof, now part of Section 13 of the Act to Regulate Commerce.

And in not holding that said order did affect the interstate commerce of the plaintiff as aforesaid (R. 6).

Ninth: Said court erred in holding that the said order of said Board was not an unreasonable exercise of the police power and did not thereby deprive the plaintiff of its property without due process of law.

And in not holding that said order was an unreasonable exercise of the police power and did thereby deprive the plaintiff of its property without due process of law (R. 6).

Tenth: Said court erred in holding that the denial by the New Jersey Supreme Court of a review of said order of said Board did not deprive the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property (R. 6).

And in not holding that said denial did deprive the plaintiff of such fair opportunity to submit said issue to

such judicial tribunal for determination, as aforesaid (R. 7).

Eleventh: Said court erred in holding that said order did not confiscate the property of the plaintiff for the benefit of other persons and did not deny to the plaintiff the equal protection of the laws.

And in not holding that said order did confiscate the property of the plaintiff and did deny the plaintiff the equal protection of the laws, as aforesaid (R. 7).

Twelfth: Said court erred in holding that said order did not impair the obligation of a contract between the plaintiff and the State of New Jersey, to wit, a contract made between the plaintiff and the State Highway Commission, acting for and on behalf of the State of New Jersey, for the elimination of the grade crossing known as South Bridge street, or State Highway Route No. 16, in the manner and according to the terms of the contract described in the bill of complaint and the affidavits and exhibits of the plaintiff.

And in not holding that said order did impair the obligation of said contract, as aforesaid (R. 7).

Thirteenth: Not urged.

Fourteenth: Said court erred in holding that the statute of the State of New Jersey, entitled "A supplement to an act entitled 'An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers' approved April twenty-first, one thousand nine hundred and eleven," approved March 12, 1913 (N. J. P. L. 1913, p. 91) and the act to which the same is a supplement (N. J. P. L. 1911, p. 374), as amended, under the authority of which said order was made, as construed by said New Jersey Supreme Court and by said District Court, did not violate the Constitu-

tion of the United States, to wit, Article I, Section VIII, paragraph 3, reading as follows:

> "The Congress shall have power • • •
> 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (R. 7).

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Fifteenth: Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article I, Section X, paragraph 1, reading in part as follows:

> "No State • • • shall pass any • • • law impairing the obligation of contracts."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Sixteenth: Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article VI, Section II, reading in part as follows:

> "This Constitution, and the laws of the United States, which shall be made in pursuance thereof; • • • shall be the supreme law of the land."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Seventeenth: Said court erred in holding that said statutes, as so construed, did not violate the Constitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Eighteenth: Said court erred in holding that said statutes, as so construed, did not violate the Con-

stitution of the United States, to wit, Article XIV, Section I, reading in part as follows:

> "Nor shall any state • • • deny to any person within its jurisdiction the equal protection of the laws."

And in not holding that said statutes, as so construed, were in violation thereof (R. 8).

Nineteenth: Said court erred in holding that said statutes, as so construed, did not impose upon the plaintiff a necessity for unreasonable expenditures for structures and maintenance-of-way in conflict with certain provisions of the act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (2), (3) and (4) of Section 422 thereof, now part of Section 15a of the act to regulate commerce.

And in not holding that said statutes, as so construed, were in conflict with said act, as aforesaid (R. 8, 9).

Twentieth: Said court erred in holding that said statutes, as so construed, did not create, constitute and impose an unreasonable and arbitrary requirement and burden upon, interference with, impediment of and discrimination against, the interstate commerce of the plaintiff, and otherwise impair the usefulness of its facilities therefor, in conflict with certain provisions of the Act of Congress known as "Transportation Act, 1920," approved February 28, 1920, to wit, paragraphs (3) and (4) of Section 416 thereof, now part of Section 13 of the act to regulate commerce.

And in not holding that said statutes, as so construed, were in conflict with said act, as aforesaid (R. 9).

Twenty first: Said court erred in holding that said statutes, as so construed, did not constitute an unreasonable exercise of the police power and thereby deprive the plaintiff of its property without due process of law.

And in not holding that said statutes did constitute an unreasonable exercise of the police power and did thereby

deprive the plaintiff of its property without due process of law, as aforesaid (R. 9).

Twenty-second: Said court erred in holding that said statutes, as so construed, did not confiscate the property of the plaintiff for the benefit of other persons, and deny to the plaintiff the equal protection of the laws.

And in not holding that said statutes, as so construed, did confiscate the property of the plaintiff and deny to the plaintiff the equal protection of the laws, as aforesaid (R. 9).

Twenty-third: Said court erred in holding that said statutes, as so construed, did not impair the obligation of a contract between the plaintiff and the State of New Jersey, to wit, a contract made between the plaintiff and the State Highway Commission, acting for and in behalf of the State of New Jersey, for the elimination of the grade crossing known as South Bridge street, or State Highway Route No. 16, in the manner and according to the terms of the contract described in the bill of complaint and the affidavits and exhibits of the plaintiff.

And in not holding that said statutes, as so construed, did impair the obligation of said contract, as aforesaid (R. 9, 10).

Twenty-fourth: Said court erred in holding that said statutes, as so construed, did not deprive the plaintiff of its property without due process of law, in that thereby the plaintiff was refused a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order of said Board confiscates the plaintiff's property.

And in not holding that said statutes, as so construed, did deprive the plaintiff of such fair opportunity to submit said issue to such judicial tribunal for determination, as aforesaid (R. 10).

SUMMARY OF ARGUMENT.

At the final hearing it was stipulated by counsel that the case should be submitted for final determination on the record at the hearing of the order to show cause, including the affidavits and exhibits filed with the Court by both parties on the application for interlocutory injunction (R. 169, *et seq.*).

It was further stipulated that there be included as a part of the record *in addition*, a condensed statement of the testimony of the witnesses who had testified before the Board of Public Utility Commissioners at the hearings before said Board on the proceedings therein instituted (R. 176).

We have prepared a summary of this testimony and of these affidavits which is printed as Appendix "A" to this brief and reference will be made to this summary in the argument of the legal questions which are now urged before this court without repeating same at length.

The following is a summary of the argument:

I.

The Order of the Board violates the Commerce Clause of the Constitution, and Sections 13 and 15a of the Act to Regulate Commerce.

Section 266 of the Judicial Code (Sec. 380 U. S. C.), under which this suit was brought, applies to the orders of an administrative board or commission of a state purporting to act under authority of a state statute, when the order is attacked as violative of the federal Constitution.

(a)

The order of the Board requires the appellant to make unreasonable expenditures for structures and maintenance.

Said order directs the appellant to eliminate, at its own expense, a grade crossing, in accordance with a plan, the cost of which is more than twice as much as the cost of another plan submitted by appellant, which would adequately serve all reasonable requirements of public safety and convenience.

The questions presented in this case are novel and have never been involved or considered in any previous decision of this court relating to the power of a state to require the elimination of railroad grade crossings.

The first question arises under the provisions of the Transportation Act, 1920, and the decisions of the courts and of the Interstate Commerce Commission relating thereto.

The history of the Transportation Act and the decisions of the Interstate Commerce Commission construing and interpreting the provisions thereof relating to the maintenance of way, structures and equipment, show that the purpose and the policy of said Act are to balance the cost of operation and maintenance against the rates fixed by the Commission, so as to enable the carriers to earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property held for and used in the service of transportation, as fixed by the statute and by the Commission. Such fair return is required by the statute to be based upon "honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment."

The record herein shows that the appellant has not yet been able, under the rates prescribed by the Commission, to realize the fair return fixed by the Commission.

The record shows that the estimated cost to the appellant of eliminating the crossing in the manner required by the order under review, is $324,400 (exclusive of property damage), as compared with an estimated cost of $145,024.47 (including cost of land and damages) of eliminating the crossing, in accordance with the plan proposed by the appellant, and as compared with an estimated cost of $205,184.07 (including cost of land and damages), in accordance with an enlargement of appellant's plan to provide the same number and width of roadways and sidewalk spaces as required by the Board's plan.

The record shows that the plan proposed by the appellant, either in its original form or as enlarged, is feasible and practicable for the elimination of the crossing and in accordance with standard practice, and that there was no substantial basis for the objections thereto.

The carriers have no right to make, and the states (or Boards or Commissions thereof) have no right to order, unreasonable expenditures for structures in the elimination of grade crossings; such expenditures must not exceed the legal duties of the carrier or the reasonable requirements of public safety and convenience.

(b)

The order imposes unreasonable burdens upon and discrimination against the interstate commerce of the appellant and impairs the usefulness of its facilities therefor.

The plan of the Board requires an extravagant expenditure of appellant's earnings, instead of conserving them for the purpose of furnishing adequate transportation facilities and necessary improvements within the limits of reasonable economy, and thereby impairs appellant's efficiency as an instrument of interstate commerce.

The principles of the rate cases apply to any other attempted "regulations" by the state.

The power of the state to require the elimination of dangerous grade crossings must be exercised with due regard to the efficiency of the carrier as an instrument of interstate commerce and must not exceed its legal duties or the requirements of public safety and convenience.

The record shows that the reasonable cost of eliminating the grade crossing in question would be, at the most, about $205,000.00, and the state therefore has no right to appropriate out of the interstate revenues of the appellant an excess of $120,000.00 or more for such purpose.

II.

The Order of the Board violates the Constitution by impairing the obligation of a contract previously made between the Appellant and the State Highway Commission for the alteration of the grade crossing in question.

This Court may determine all questions involved in the case, including questions of State law.

Discussion of the relative power and authority of the Board of Public Utility Commissioners and of the State Highway Commission.

The power of regulation of public utilities does not extend beyond the express terms of the legislative grant.

The statute of New Jersey authorizing the Board of Public Utility Commissioners to order the elimination of grade crossings, applies only to crossings upon highways that are under the jurisdiction and control of a municipality, and does not apply to a crossing on a State highway over which the Highway Commission has exclusive control.

The statutes of New Jersey creating the Highway Commission and the State Highway System, by their terms, and as construed by the State courts, give said Commission exclusive jurisdiction and control over the elimination of grade crossings on State highways.

The record shows that the appellant and the Highway Commission, prior to the institution of the proceedings in which the order under review was made, conducted negotiations and had consummated a contract for the elimination of the crossing in accordance with a plan proposed by the Commission and accepted by the appellant, under which the appellant agreed to contribute, and the Commission agreed to accept, the sum of $40,000 as appellant's share of the cost.

The record further shows that after said contract was made, the appellant, acting upon the faith thereof, prepared working and detail plans and performed certain preliminary work on the ground, according to said plan, and actually expended for such purposes approximately $5,000.

The authorities show that there was a complete and binding contract between the appellant and said Commission.

III.

The Order of the Board, and the statutes under which it was made, as construed by the Courts of New Jersey, violate the due process and equal protection clauses of the Constitution.

(a)

The order is an unreasonable exercise of the police power.

The police power of the State is not limitless, but must be exercised in a reasonable manner and the question

whether it has been so exercised is subject to judicial determination.

This case presents the question whether the police power has been exercised in a reasonable manner when the State orders the expenditure of an unreasonable amount for the elimination of a grade crossing when the record shows that reasonable requirements of public safety and convenience can be adequately met by the expenditure of a substantially less amount.

Said order is unreasonable and arbitrary in the following particulars:

1. It requires an unnecessarily expensive plan.

2. It requires an undererossing in excess of the legal width of the highway and in excess of the demands of public travel, and takes a substantial area of the land of the appellant therefor without compensation.

3. It requires the elimination of a grade crossing at Camp Lane, which is not fairly incidental or necessary to the elimination of the principal crossing.

In accordance with the principles established by the decisions of this Court, the appellant seeks to prevent the State from taking its property in excess of the cost of a reasonable plan for eliminating the crossing.

The imposition of expense upon the appellant in an amount which is greater than is reasonably required, violates the 14th Amendment.

(b)

The order confiscates appellant's property for the benefit of others.

The record shows that the elimination of the crossing in the manner required by the Board's order is for the sole

benefit of property owners and residents in the immediate vicinity of the crossing.

(c)

The order of the Board and the statutes under which it was made, as construed by the Courts of New Jersey, deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.

The statutes of New Jersey deny to the appellant a review of the order of the Board of Public Utility Commissioners as a matter of right.

Under these statutes, and the decisions of the Courts of the State of New Jersey, the only review of such an order is by writ of certiorari, issued by the Supreme Court, if and when allowed in the discretion of said Court, or a justice thereof.

The allowance or refusal of a writ of certiorari is discretionary and is not subject to review by any New Jersey Courts.

The Public Utilities Act limits the power of the State courts, on such review, to set aside an order (made within the jurisdiction of the Board) when there is *no* evidence to support reasonably the order.

In the present case the appellant was in fact denied any review whatever by the refusal of a justice of the Supreme Court, and of the Court itself, to allow a writ of certiorari.

The record brings this case within the principle of the decision of this Court in the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908.

Discussion of the statute of Pennsylvania under which that case arose and the decision of this Court relating thereto.

Discussion of the case of *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. Ed. 269, and of the statute of Connecticut therein involved, and comparison thereof with the New Jersey statute with reference to the right of review

Discussion of the penalties prescribed by the New Jersey statutes for violation of orders of the Board.

IV.

Discussion of the opinions below.

The opinions of the Board and of the Courts below were erroneous in law, and contrary to the facts disclosed by the record.

ARGUMENT.

I.

The Order of the Board violates the Commerce Clause (Art. I, Sec. VIII, Pgf. 3) of the Constitution, and Sections 13 and 15a of the Act to Regulate Commerce.

Under authority of the power to regulate commerce conferred by Article I, Section VIII, Paragraph 3, of the Constitution, Congress enacted the Act to Regulate Commerce (24 Stat. 379) and its various amendments, including the Transportation Act, 1920 (approved February 28, 1920, 41 Stat. 456), the provisions of which it is claimed by the appellant, are violated by the order of the Board.

Under Section 266 (§380 U. S. C.) the statutory court considers the validity of a state statute, or of an order made by an administrative board or commission acting under and pursuant to such state statute, when the statute or the order is attacked on the ground that the same is in violation of the Federal Constitution.

The section applies to orders made under state statutes, as well as to the statutes themselves (*Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 67 L. ed. 659; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 67 L. ed. 853; *Louisville & N. R. Co.* v. *R. R. Com.*, 308 Fed. 35).

(a)

Said Order requires the Appellant to make unreasonable expenditures for structures and maintenance.

New Legal Questions.

The defendants relied below chiefly upon the case of *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; 38 L. Ed. 269, and upon the case of *Erie R. R. Co.* v. *Board*, (254 U. S. 394; 65 L. Ed. 322 (wherein Chief Justice White

and Justice Van Deventer and Justice McRaynolds dissented), as having settled the law on the powers of the New Jersey Board of Public Utility Commissioners to order the elimination of grade crossings under the Fielder Act (Ch. 57, Laws 1913, p. 91). The *Bristol Case* was decided in 1894, and the *Erie Case* involved a state of facts and law existing in 1913. The Transportation Act, 1920, has since been enacted, with its new declaration of principles of public regulation of and financial support for the carriers, and its requirement for reasonable expenditures for structures and maintenance.

In this case we present no questions that were decided or considered in the *Bristol, Erie* or any other case. Our argument under this point is based upon the provisions of the Transportation Act, 1920, and the decisions of the courts and of the Interstate Commerce Commission interpreting, construing and enforcing the purposes and provisions of that act. In the *Los Angeles Station Case* (264 U. S. 331), the Court said:

> "We avoid any inquiry how far, if at all, the principle laid down in Erie R. Co. v. Public Utilities Comrs. (citations) is qualified by the provisions of the Transportation Act."

In *McAneny, et als.* v. *N. Y. Central R. Co.*, 238 N. Y. 122, the New York Court of Appeals set aside an order of the Transit Commission requiring the railroad company to abolish a grade crossing by constructing a viaduct, not only across the railroad, but also extending across an adjoining parkway. In discussing the increased cost occasioned by this extension of the viaduct, the Court said (p. 385):

> "When it comes to the question of state legislative power to impose great expense on interstate railroads without the action of the Interstate Commerce Commission, the position of the railroads would probably be materially strengthened by the recent decision of the Supreme Court of the United States in *Railroad Commission* v. *Southern Pacific*."

The Transportation Act, 1920.

By Section 400 of the Transportation Act, Section 1 of the Act to Regulate Commerce was amended to give the Interstate Commerce Commission complete control over carriers engaged in the transportation of passengers or property wholly by railroad in interstate commerce and provides, in paragraph (3) of that section, "The term 'railroad' as used in this act shall include all *bridges* • • • used by or operated in connection with any railroad, and also *all the road* in use by any common carrier operating a railroad, • • •, and also all switches, spurs, *tracks*, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, *including all freight depots, yards and grounds*, used or necessary in the transportation or delivery of any kind of property."

This gives the Interstate Commerce Commission jurisdiction and control of the appellant's railroad and appurtenances at the point in question in this suit, and of any bridge that might be constructed there.

Section 422 of the Transportation Act added to the Act to Regulate Commerce a new section known as Section 15a, paragraphs (2), (3) and (4) of which provide as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management *and reasonable expenditures for maintenance of way, structures and equipment*, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to

modify or adjust any particular rate which it may find to be unjust or unreasonable and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation; *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, insofar as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

The Decisions of the Interstate Commerce Commission.

The Interstate Commerce Commission instituted a proceeding known as "Ex parte 74" (58 I. C. C. 220), in which it divided the country into certain rates groups or territories (one of which, known as the "Eastern Group," embraces the railroad of the plaintiff), determined and established rates intended, "under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment," to earn an aggregate annual net railway operating income, as nearly as may be, of 6 per cent. ($5\frac{1}{2}$ per cent. plus one-half of 1 per cent.) specified in paragraph (3) of Section 15a.

Those rates continued until May 16, 1922 ("Reduced Rates, 1922," 68 I. C. C. 676), when the Commission decided what in its judgment would, in the future, be a fair return upon the aggregate property of the carriers.

In that decision the Commission said (p. 861):

> "It is obvious that large additions to capital must continually be made. Most of the capital will have to be acquired through the issuance of securities which must be sold in the markets of the world in competition with other classes of securities. Within the next few years the Government must provide for the refunding of some six billions of its indebtedness. The carriers must attract money by rates of return and stability of investment. While the return must not exceed a reasonable charge against the public served, it must be such as to obtain the needed new capital. It is necessary to determine and make public, as required by section 15a, a percentage of fair return."

At page 682 the Commission says:

> "In numerous cases cited, courts and regulating authorities of States have recognized that public utilities and railroads may be permitted individually to earn under reasonable rates at least six per cent. upon fair value. In some instances higher

rates of return have been approved. But we are here considering return upon 'the aggregate value of the railway property.'"

"The interstate commerce act in many provisions other than those quoted indicates that six per cent. may be regarded as a fair return. Paragraph (6) of section 15a provides for the disposition of net railway operating income in excess of six per cent. of the value of the property held for and used in the service of transportation."

After discussing all of the elements that had entered into the cost of railway operation and maintenance during the two years intervening between this decision and the previous one, and after discussing the various individual commodities, the rates upon some of which had been reduced in the meantime, the Commission concluded (p. 732):

"It is our duty to initiate such rates as will enable the carriers to earn as nearly as may be a fair return, qualified as provided in the act. In 1920 we authorized large increases in freight rates and passenger fares designed to produce the necessary revenues under the conditions then prevailing. There was then little doubt of the ability of industry to bear the increased charges. The situation has since changed. The country has been passing through a period of abundant supply and slack demand, in which prices at the source have fallen off sharply. High rates do not necessarily mean high revenues, for, if the public can not or will not ship in normal volume, less revenue may result than from lower rates.

Shippers almost unanimously contend, and many representatives of the carriers agree, that 'freight rates are too high and must come down.' This indicates that transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers 'to provide the people of the United States with adequate transportation.'"

* * * * * *

Page 734:

"We are of opinion that a general reduction in the rate level, as substantial as the condition of the carriers will permit, will tend not only to lessen the transportation burden but also to equalize and stabilize the conditions under which commerce and industry are carried on, with consequent fuller assurance to the carriers of realizing the fair return contemplated by the law.

* * * * * *

After considering all the facts of record, *including the necessity of reasonable expenditures for additions and betterments*, we find and determine:

1. That on and after March 1, 1922, a fair return upon the aggregate value of the railway property of the carriers defined in section 15a of the interstate commerce act, determined as therein provided, will be 5.75 per cent. of such aggregate property value as a uniform percentage for all rate groups or territories designed by this commission.

* * * * * *

Page 735:

"3. That the freight rates and charges herein determined will enable the carriers in the respective rate groups, under honest, efficient, and economical management *and reasonable expenditures for maintenance of way, structures, and equipment*, to earn an aggregate annual net railway operating income equal, as nearly as may be, to a return of 5.75 per cent. upon the aggregate value, as taken for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation."

The purpose of the Interstate Commerce Commission in these decisions of 1920 and 1922 was to carry out the provisions of the Transportation Act in such a manner as to balance the cost of operating, maintaining and conducting the railroads against the rates fixed by the Commission so as to leave a margin for the railroad companies between disbursements and revenues equal to the amount of the

fair return fixed, first by the statute at an aggregate of 6 per cent., and then, by the Commission's decision of 1922 at 5¾ per cent.

The Purpose of the Act.

The broad and comprehensive purpose of the Transportation Act, 1920, was fully declared when the bill was before Congress (Senate Report No. 304, House Report No. 456).

The purpose to deal with transportation problems from the *national standpoint*—to treat the railroads as a whole rather than as unrelated systems—is also shown in the Senate report (p. 12):

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations, that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. All the railways we have, or substantially all, must be maintained; and, from time to time, they must be enlarged and additional facilities must be provided."

Similar statements of the purpose are to be found in the House Report (p. 5):

> "The increasing tendency of Congress *to exercise to the full the powers granted it under the commerce clause of the Constitution*, and the decision of the Supreme Court of the United States in the *Shreveport* and *Minnesota Rate* cases, indicate a gradual but certain diminution of State control."

On December 4, 1919, Senator Cummins addressed the Senate as committee of the whole regarding Section 407 of the Transportation Act (in part), as follows:

> "According to the decisions of the Supreme Court of the United States, and according to the views of every other tribunal in all the world of which I have ever heard, they have this general idea with regard to the regulation of public utilities: that is to say, *if a public utility is fairly constructed, if it is properly and efficiently managed*, it has a right under the Constitution to earn a fair return upon the investment, upon the value of the property which renders the service—not upon the value of the property as determined by a capitalization of its earnings under a given body of rates—but it has a constitutional right to earn, as against regulation, a fair return upon the value of the property—*that is, its investment—if it has been honestly constructed* and is efficiently operated. The Supreme Court of the United States has declared that doctrine over and over again. It is idle for us to attempt, even if we were to attempt, to escape the principle which the courts have laid down. *It is a just principle;* it is fair and honest; and I, for one, do not desire to escape it" (Congressional Record, V. 59, pp. 130-133).

Another portion of Senate Report reads as follows:

> "In this regard the bill attempts to accomplish three results:
>
> First. By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.
>
> Second. In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary."

On February 23, 1920, Senator Robinson (Ark.), speaking on the conference report relative to Section 422 of the bill, said:

> "The Commission is directed to so modify or adjust rates that carriers as a whole or in such groups or territories as the Commission may designate, will, under honest, efficient, and economical management and *reasonable expenditures for maintenance of way, structures,* and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of the carriers, as a whole, or in such groups held and used in the service of transportation.
>
> The Commission is empowered and directed to determine and make public what percentage of such aggregate property value constitutes a fair return and this percentage is made uniform for all rate groups.
>
> In fixing this rate the Commission is directed to take into consideration, among other things, the transportation needs of the country and the necessity of enlarging facilities to meet the requirements of the public.
>
> *Honest and economical management and expenditures constitute an important and controlling consideration.*
>
> • • • • • • •
>
> The provision gives due consideration to *the necessity for honest and economical management.*
>
> It has the advantage of certainty. It inspires confidence in investors, makes probable necessary developments in our transportation system and safeguards the public against the dangers and losses likely to result from an inefficient and inadequately maintained transportation system.
>
> *It is one of the most effective and valuable provisions in this bill.* Stripped of confusion and the misrepresentation, it stands forth as an evidence of the willingness and ability of the Congress to enact necessary and practical legislation to assure the preservation of existing transportation facilities

and to make probable the development of additional facilities demanded in the public interest" (Congressional Record, V. 59, pp. 3329-3334).

The Policy of the Act.

The only reservation in the Act in favor of the exercise of the police power of the states is found in the proviso at the end of paragraph 17 of Section 402 of the Act, which limits the power of the states:

> "To require just and reasonable freight and passenger service *for intrastate business*, except so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Twice in the Act, once in paragraph 2, and again in paragraph 7 of Section 422, the purpose is stated to provide "a fair return upon the aggregate value of the railway property of such carrier held for and used in the service of transportation," and in providing such a fair return, which is a duty imposed by the Act upon the Interstate Commerce Commission, that Commission is directed, in paragraph 3 of Section 422 (now par. 3 of Sec. 15a of the Act to Regulate Commerce), as follows:

> "In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (*under honest, efficient and economical management of existing transportation facilities*) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

Again, in paragraph 5 of the same section, the purpose is declared:

> "To establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation."

In paragraph 2 of Section 439 of the Transportation Act (now Sec. 20a of the Act Regulating Commerce) the Interstate Commerce Commission is authorized to make orders approving the issuance of securities if they find such issuance:

> "Is for some lawful object within its corporate business, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service."

The paragraphs of the Transportation Act quoted above require the Interstate Commerce Commission to—

> (a) Determine the aggregate value of the railway property of the carriers held for and used in the service of transportation;
>
> (b) Determine and make public what percentage of such value constitutes a fair return thereon; and
>
> (c) Establish rates so that the carriers will, under *honest, efficient* and *economical management* and *reasonable expenditures for maintenance of way, structures and equipment*, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon that value.

Paragraphs 6 to 9, inclusive, of Section 15a of the Act to Regulate Commerce (as amended by Sec. 422 of the Transportation Act) contain what is known as the "Recapture Clause" and provide for a division between the railroad companies and the Government of all earnings in excess of 6 per cent. This gives the Federal Government a potential financial interest in the prosperity of every railroad in the United States.

It will be observed that the fair return which the Commission is authorized to establish, is predicated upon certain essential conditions, namely:

> (a) "Honest, efficient and economical management."

(b) "Reasonable expenditures for maintenance of way, structures and equipment."

The latter condition is expressly mentioned in the Commission's order of 1922 ("Reduced Rates, 1922, 68 I. C. C. 676"). The rates therein fixed were decided upon

"After considering all the facts of record, *including the necessity of reasonable expenditures for additions and betterments*" (p. 734).

The Facts.

The testimony before the Board and the affidavits and exhibits filed in this case are summarized (with full record references), in Appendix "A." They show that:

The effect of Commission Order of 1922 upon the appellant, as shown by Exhibit "L" (R. 174-175), has been to yield to the appellant the following net railway operating return:

1923	2.62 per cent.
1924	4.42 per cent.
1925	4.83 per cent.
1926	5.15 per cent.
1927 (11 months)	3.67 per cent.

It appears from these figures that appellant has not yet been able, under the rates so prescribed, to realize what the Commission has determined is a fair return.

The plan adopted by the Board calls for the construction of a steel railway bridge 105 feet long and 134 feet wide, with a highway undercrossing, 66 feet wide, on the line of the present highway Route No. 16, at an angle of 29 degrees and 30 minutes across the railroad, raising the railroad tracks 6 inches, with steel girders extending above the top of the rails and providing two 20-foot roadways, and two sidewalks each having a clear width of 8 feet 6 inches. The legal width of the highway on each side of the railroad is 33 feet with a travelled portion 20

feet wide including an improved pavement 18 feet wide. The plan also called for the closing of Camp Lane Road, an unimportant highway located about 1,400 feet easterly of Route No. 16 crossing, and the construction of a connecting road, for a distance of 1,940 feet along southerly side of the railroad. The cost of this project as estimated by the Board's Chief Engineer is—

Undercrossing on Route No. 16	$307,950.00
Camp Lane connecting road	10,450.00
Providing detour	6,000.00
Total (exclusive of property damages)	$324,400.00

Plan "C," approved by the Highway Commission and offered by the appellant before the Board, proposed a relocation of Highway Route No. 16 from a point 950 feet south to a point 1,300 feet north of the railroad and the construction of a concrete slab top railroad bridge with a highway undercrossing 40 feet wide, across the railroad at an angle of 54 degrees, at a point 400 feet east of the present crossing, providing two 18-foot roadways and no sidewalks, and making no provision for closing or otherwise affecting the crossing at Camp Lane Road. The relocation of the highway would increase its length only 125 feet. Highway Route No. 16 crossing is in a farming community and there are no sidewalks on this highway on either side of the railroad.

The estimated cost of Plan "C" is $145,024.47 including the cost of land to be acquired for the relocated portion of the highway and damages to adjoining property.

During the hearings before the Board, the appellant, in order to avoid the great expense of the Board's plan, suggested a revision of its plan so as to provide an undercrossing 66 feet wide with two 20-foot roadways and two sidewalks each 9 feet wide, closing Camp Lane Road

crossing and providing a connecting roadway along the south side of the railroad.

Except for the relocation of the Highway Route No. 16, the appellant's Plan "C," as so revised, provides an undercrossing identical with that of the Board's plan in all particulars of width between abutments, width of roadways, sidewalks (except that its sidewalks will be 6 inches wider) and all other highway facilities, including the same provisions for closing Camp Lane crossing and connecting roadway.

The estimated cost of Plan "C" as so revised, is $205,184.70, including the cost of land to be acquired for relocating Route No. 16 and for the connecting roadway, and damages to adjoining property.

The difference in cost between the Board's plan and appellant's Plan "C," as revised, is $119,215.30 (or in round numbers $120,000), plus the cost of acquiring land for the 1,940 feet connecting road required by the Board's plan, and damages, if any, to adjacent property.

The difference in cost between the Board's plan and Plan "C," as *originally* presented by appellant (which had been approved and adopted by the State Highway Commission) is $179,375.53, exclusive of the cost of land and damages.

Considering, for the sake of argument under this point, only appellant's Plan "C" as revised so as to provide at the proposed location the same dimensions and width of roadways and sidewalks as is proposed by the Board's plan at the present location of Route No. 16 crossing, and the same treatment of Camp Lane crossing, *the only objection urged against the appellant's plan related to the 6 degree curves involved in the relocated roadway.*

No objections were made by the State Highway Commission which had already approved this relocation, and

originally designed and approved these precise curves. No objection was made by the Board's Chief Engineer.

While Mr. Wasser, the only other competent witness who testified in opposition to Plan "C," objected to the curves on general principles, he admitted that a 6-degree curve is "perfectly safe" and "an accessible curve for all conditions" (R. 195). He testified that the sharper angle of crossing of the Board's plan *would increase the total length of the undercrossing by about 47 feet* and would increase the cost of the structure.

Other witnesses, all residents of the community in which the crossing was located, objected to the relocation of the highway; some on account of the curves, but most of them because they feared the relocation would adversely affect the value of their property located along the present highway. The objectors preferred the retention of the present location of the crossing for their own private benefit. Their testimony consisted of the opinions of unqualified and unskilled persons, and was not supported by any competent evidence. It was inadmissible under the ordinary rules of evidence.

Telfer v. *Nor. R. Co.*, 30 N. J. L. 188, 193;
Seifred v. *P. R. R. Co.*, 55 Atl. Rep. 1061.

Opposed to this testimony stand the records of the State Highway Commission of New Jersey showing that Plan "C," with the proposed relocation of the highway and its 6-degree curves, was originally designed, prepared and signed by its own State Highway Engineer and repeatedly approved and defended by its own resolutions, which have never been altered or rescinded. There is also the testimony taken before the Board as well as the affidavits that were filed in this cause, on behalf of appellant, of its Chief Engineer and Engineer of Grade Crossings, the Chief Engineer of the New York Public Service Commission and Mr. Diehl, a practicing and consulting engi-

neer of Buffalo, all highly qualified by training and experience to give accurate, authentic and convincing testimony on the subject. Their qualifications are described and a summary of their testimony is given in Appendix "A"

Briefly stated, that testimony shows that Plan "C" is a perfectly feasible and practicable plan that will provide a safe, adequate and proper method for eliminating the grade crossing involved in a manner suitable to the locality and all the circumstances of the situation; that the proposed curvature will not obstruct the view on the highway, is inconsequential, entirely safe, unnoticeable to highway travellers, will not diminish or affect the safety, convenience or capacity of the highway, is entirely desirable from economic and other points of view, and is the accepted standard practice for constructing highway bridges over streams and over or under railroads in other places where similar conditions exist.

These witnesses recite numerous instances of the kind and give their reasons in detail. It is everywhere the practice to similarly relocate highways in grade crossing elimination work in order to provide crossings at less acute angles and thereby shorten the length of the underpass and reduce the cost of construction and maintenance. It is the practice of the Public Service Commission in New York State to make similar relocations if thereby they can save $20,000 or $30,000. Here such a relocation will save at least $120,000 without causing the slightest degree of danger or inconvenience to or diminution of highway traffic.

Decisions.

In *Galveston Electric Co.* v. *City of Galveston* (258 U. S. 388, 66 L. ed. 678), it was said:

> "The intent of Congress was to create a steady and reliable flow of money 'for enlarging such facilities in order to provide the people of the

United States with adequate transportation.' *A substantial reduction in the percentage of return might be unsettling in its effect, particularly in light of the fact that the return allowed in 1920 was not realized.* The fact that a utility may reach financial success only in time or not at all is a reason for allowing a liberal return on the money invested in the enterprise."

In the *Los Angeles Station* case (*Railroad Commission of California* v. *Southern Pacific Co.*, 264 U. S. 331, 68 L. ed. 713), this court affirmed a decision of the Supreme Court of California setting aside an order of the California Commission which required the construction of a union station for the several railroads involved in connection with the elimination of various grade crossings. The Court said:

"Our only question here is whether the power to direct a new union station, with its essential incidents, is committed exclusively to the Interstate Commerce Commission under the Act of 1920.

In Dayton-Goose Creek R. Co. *v.* United States, decided January 7, 1924 (263 U. S. 456, ante, 388, 33 A. L. R. 472, 44 Sup. Ct. Rep. 169), this court said of the Transportation Act:

'The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the (Interstate Commerce) Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and, by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged . . .'

> *The purpose of Congress to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions is further shown in Sec. 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Sec. 20a.* This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds, or other evidence of indebtedness, *and forbids approval unless the commission shall find that their issue is for a lawful purpose*, is compatible with the public interest, *is appropriate and necessary to the discharge of its public duty as a common carrier, and will not impair its ability to perform that service.* This is, of course, in pari materia with the restriction of paragraph 21 of Sec. 402, to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties."

We think this is also in *pari materia* with paragraph (2) of section 15a requiring reasonable expenditures for structures, &c.

This decision declares the purpose of Congress in enacting the Transportation Act "to prevent interstate carriers from incurring expense which would lessen their ability to perform well their interstate functions."

In *Akron, C. & Y. R. Co. v. U. S.* (261 U. S. 184, 67 L. Ed. 604), the Supreme Court considered the provision of the Transportation Act relating to the division of rates (*New England Divisions Case*). At page 189, Justice Brandeis discusses "the new railroad policy" introduced into Federal legislation by the Transportation Act, 1920, and in the notes at the bottom of the page are enumerated the various expressions of "the new purpose" contained in that Act. Then he says:

> "And to attain it, new rights, new obligations, new machinery, were created. The new provisions took in a wide range. Prominent among them are

those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads, funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear.

• • • • • •

Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers" (pp. 190, 191).

In *Dayton-Goose Creek R. Co.* v. *U. S.* (263 U. S. 456), 68 L. ed. 388, this Court sustained the "recapture" paragraphs of Section 422 of the Transportation Act. After referring to the provisions of that act fixing rates so as to yield a fair return, and citing the cases of *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, and case of *A. C. & Y. R. Co.* v. *U. S.*, 261 U. S. 184, the Chief Justice said (p. 478):

> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To

> regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety." (Citing cases.)

At p. 479 the opinion continues:

> "If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service."

In *Colorado v. U. S.* (271 U. S. 153, 70 L. ed. 878), this court considered a case in which the State of Colorado brought a suit to enjoin and set aside an order of the Interstate Commerce Commission granting a certificate of public convenience and necessity for the abandonment of a branch of the Colorado and Southern Railway Company, located wholly within the State of Colorado. That branch was built under a charter granted by the State of Colorado and the state contended that the Interstate Commerce Commission had no authority to order the abandonment of intrastate traffic on the branch, without the consent of the state. The opinion of this court delivered by Justice Brandeis holds (p. 162):

> "The extent and character of this service (intrastate) is subject to regulation by the state. The inherent power of a state to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable."

Regarding the state's contention that the Interstate Commerce Commission had no power to authorize the company to abandon intrastate traffic, the opinion says (pp. 162, 163):

> "The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18

20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discriminations. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss" (citing illustrative cases) * * * (p. 164).

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole."

* * * * * * * *

Rates which will afford a fair return must balance income and outgo. The interest of the shippers requires honest, efficient and economical management and *reasonable expenditures for maintenance of way, structures* and equipment; otherwise either the fair return or reasonable rates is impossible and the wise plan of Section 15a becomes a nullity.

The constitutional guarantees may not be made to yield to mere convenience.

Schlesinger v. *Wisconsin*, 270 U. S. 230, 70 L. ed. 557;

Weaver v. *Palmer Bros.*, 270 U. S. 402, 415; 70 L. ed. 654, 658.

It is well settled that a state has no power to fetter the right to carry on the interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it.

Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 201; 59 L. ed. 193, 196;

Michigan P. U. Com. v. *Duke*, 266 U. S. 570, 577; 69 L. ed. 445, 449.

The Board, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation.

Banton v. *Beltline Ry. Corp.*, 268 U. S. 413, 420; 69 L. ed. 1020, 1025.

Sound business economy and the necessity of the lowest practicable rates supports the law in requiring in our case a *reasonable expenditure* (and no more) for the elimination of this under-crossing. If the Board's order requires an unnecessary width or length of under-pass, or unnecessary sidewalk spaces, or a substantial increase in the cost of the project by reason of maintaining present alignment of the highway when a relocation of the highway and a change of its alignment can be made without impairing the safety or convenience of the public, that order imposes upon the plaintiff an unreasnoable expenditure for this structure in violation of this provision of the law.

Giving weight to these considerations and to the principles laid down in the decisions with respect to rates, it

seems manifest that for the protection of the carriers as instruments of commerce, Congress has very properly exercised the right to limit the expenditures for improvements and structures to the reasonable requirements of the situation, in order to maintain the balance, in the interest of the shippers and public on the one hand and the carriers on the other hand, between rates fixed by the Commission (over which the carriers have no control) and the expenditures that the carriers may lawfully be required to make for improvements. Congress has controlled every element of income derived from railroad operation; wages and working conditions of employees, operating relations between carriers, rates, rental of joint or other facilities, the amount of bonded indebtedness, and the rates of interest thereon, the price at which securities may be sold, membership of boards of directors, hours of service, safety appliances, inspection, construction and distribution of cars, locomotives and equipment, extension and abandonment of railroad facilities, extent and character of transportation service, liability of employers for accidents to employees, the manner in which various commodities shall be handled,. and many other details, sufficient in extent to comprehend every phrase of railroad transportation. Having limited the income and directed the outgo, it would be a strange situation which left it open to the states to require the expenditure of millions of dollars in excess of reasonable requirements, for local improvements like grade crossings eliminations, which earn no revenue for the carrier, and benefit only the people in the localities affected and the competing local transportation agencies operating, free of cost, on the public highways improved by such expenditures.

The extent to which this practice might affect the plaintiff, is illustrated by the statement contained in the affidavit of the Chief Engineer of appellant (R. 57, 60), giving a schedule of grade crossings on its railroad in the

states of New York, New Jersey and Pennsylvania. This schedule contains a classification of crossings made by the public authorities, according to their danger to and impediment of highway travel. That schedule shows the potential inroads that might be made upon the plaintiff's operating income by the frequent exercise of the power of state commissions for the elimination of grade crossings according to plans in excess of the reasonable requirements of public safety and convenience.

In the three states named there are 1,297 crossings on the appellant's railroad. The estimated cost of eliminating these crossings, computed by the engineers of the Public Service Commission of the State of New York with respect to crossings in that state, and by applying the same average cost per crossing in each class in the three states, gives a total potential cost of $107,791,847. It is improbable that all of these crossings would ever be required to be eliminated, but is entirely probable that all of the 150 Class A crossings, and a large number of the 306 Class B crossings, might be required to be eliminated in the not distant future. The Class A crossings are estimated to cost (in round figures) $22,500,000, and the Class B crossings are estimated to cost (in round figures) $27,000,000. It is fair to assume that these average cost estimates, made by the authorities of New York State, where the public pays one-half of the cost, are reasonably conservative and in accordance with rules of economy described by Mr. Vanneman (Chief Engineer of the New York Public Service Commission) as being practiced in New York State (R. 65, 66, 70, 197, 200, 201). Excessive requirements like those imposed by the order of the Board in the present case, would add $11,250,000 to the Class A crossings and $13,500,000 on Class B crossings; or upwards of $24,000,000 to what the appellant might reasonably be required to spend for such purposes.

On this point it is interesting to note that the plan of elimination approved and adopted by the State Highway Commission at its meeting of March 11, 1924, was estimated by its engineers to cost $109,024 (of which the appellant was willing to pay $40,000). When objections were offered to this plan because of the relocated line and the 6-degree curves involved, the Commission resolved on April 22, 1924, to adhere to this plan "on account of the considerable saving that would be effected thereby, and the further fact that the curve involved was only a 6-degree curve which was not considered serious by the State Highway Commission," and also the fact that a much shorter underpass and speedier construction would be accomplished by means of the new line as adopted (R. 137). Again, after these objections had been renewed by the residents of the community, the Commission, on June 24, 1924, resolved to adhere to the original plan (Plan "C"), "not only from an engineer's standpoint, but because of a saving of money and because they (the plans) are already prepared" (R. 139). From these references to the State Highway Commission's minutes it appears that that body had due regard for reasonable expenditures for the construction of improvements of this character.

Since rates afford the only source of carrier revenues, every legitimate expense must be covered by them. The Interstate Commerce Commission has undertaken to provide rates that will provide "as nearly as may be" a net railway operating return of 5¾ per cent on the value of the carrier's property held for and used in the service of transportation, and no state or state body can legally destroy the result.

Unless the courts are to give due regard to the language of the Transportation Act limiting the expenditures for such improvements to reasonable amounts, the Interstate Commerce Commission must authorize higher rates for the transportation service, in which case the burden

will fall upon the shippers and passengers of the carriers, or these unreasonable expenditures will further diminish the return of the appellant below what the Commission has determined to be a fair return and, as a result, the purpose of Congress to provide efficient instrumentalities of commerce with an income sufficient to foster and preserve in full vigor the transportation service, and to attract money to provide constantly necessary enlargements of transportation facilities will be defeated.

It can no longer be contended that the power of Congress is not plenary and complete or that it lacks power to deal with the carriers both individually and collectively, or to impose requirements in the form of adequate rates, or by restricting unnecessary expenditures to the extent that is necessary to provide for a fair return upon the value of the whole property of the carriers held for and used in the transportation service. This power must necessarily extend to the regulation as well as to the rates imposed by state bodies; otherwise by their orders they can destroy or defeat the purpose of Congress and subject the carriers to unnecessary or excessive expenditures that would ultimately destroy the balance sought to be provided by the Transportation Act between revenues and expenditures.

The national and complete power of Congress is illustrated by the decision in *Wilson* v. *New*, 243 U. S. 332, 347 (p. 347), 61 L. ed. 755 (p. 778), where this Court said:

> "That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation *to the full extent necessary to secure and protect it*, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject."

In paragraph 3 of Section 15a of the Act to Regulate Commerce (as amended by Sec. 422 of the Transportation Act) the Commission was directed to "give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of *existing* transportation facilities)," of enlarging such facilities in order to provide the people of the United States with adequate transportation. And in Section 500 of the Transportation Act "it is hereby declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States, *and to foster and preserve in full vigor both water and rail transportation.*" All of the existing carriers were comprehended within the Act, whether they were great or small,

Mr. Justice Holmes, in his opinion in the *Paterson Grade Crossing Case*, 254 U. S. 394, at p. 411; 65 L. ed. 322 at p. 324, with respect to the financial burdens imposed upon the railroad company by the Board's order in that case, says:

> "If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. Brooks-Scanlon Co. *v.* R. R. Commission, 251 U. S. 396."

The Transportation Act declares a new policy in this respect as clearly indicated by Senate Report No. 304, which states (at p. 12):

> "All the railways we have, or substantially all, must be maintained, and, from time to time, they must be enlarged and additional facilities must be provided."

Paragraph (5) of Section 15a of the Act to Regulate Commerce (as amended by par. 3, Sec. 422 of the Transportation Act) provides as follows:

> "To establish uniform rates upon competitive traffic which will adequately sustain *all the carriers*

> which are engaged in such traffic *and which are indispensable to the communities to which they render the service of transportation.*"

Certainly it is not the policy of the Transportation Act to have any instrument of transportation stopped. That would not be the promotion, enlargement or development, or the fostering and preserving of rail transportation in full vigor.

The new policy is different. *All* rail transportation must be fostered and preserved in full vigor and enlarged.

Maintenance.

The Transportation Act requires reasonable expenditures, not only for original cost, but also for the maintenance of structures. If this bridge is built at an angle of 29 degrees according to the Board's plan, it will be 42 feet wider than if it were built at an angle of 54 degrees as proposed by Plan "C." Also, if it is built 66 feet long, as required by the Board's plan, instead of 40 feet long, as proposed by Plan "C," as approved by the Highway Commission (Exhibit "F," R. 145-150) it will be 26 feet longer. The Board's plan would, therefore, require more than 4,000 square feet of bridge structure in excess of that required by Plan "C." This additional 4,000 square feet of bridge must not only be built in the first instance, but forever maintained by the appellant. This increased length is particularly important because the cost of both construction and maintenance increases in the ratio of the square of the length, on account of the need not only of longer, but also of heavier, members as the length increases.

Hence we have an unreasonable expenditure for maintenance, as well as for construction.

(b)

Said Order imposes unreasonable or arbitrary requirements or burdens upon, interference with, impediment of or discrimination against the interstate and foreign commerce of the appellant, and impairs the usefulness of its facilities therefor.

The Board's plan is a wasteful extravagance of the appellant's earnings, which should be conserved for use in furnishing safe, adequate and proper transportation facilities and for improvements necessary within the limits of reasonable economy, for public safety and convenience (R. 58) and to avoid unnecessary stock increases.

Mr. Hand testified that:

> "If the Board's plan is carried out it will involve a reckless and useless waste of from $120,000 to $170,000 of money which will benefit nobody, and, to that extent, will prevent the plaintiff from providing safe, adequate and proper service and the making of reasonable expenditures for necessary public improvements" (R. 59).

Paragraph (4) of Section 13 of the Act to Regulate Commerce (as amended by Section 416 of the Transportation Act) provides as follows:

> "(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, *regulation*, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, *or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful*, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, *regulation*, or practice thereafter to be observed, in

such manner as, in its judgment, will remove such advantages, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*"

Commission Action.

After the Interstate Commerce Commission, by its decision in "Ex parte 74" (58 I. C. C. 220), had increased the rates to provide a fair return, in accordance with paragraphs (2), (3) and (4) of Section 15a of the Act to Regulate Commerce (as amended by Sec. 422 of the Transportation Act), a number of the states refused to approve these increases for intrastate rates. The Interstate Commerce Commission thereupon found it necessary to exercise its power under paragraphs (3) and (4) of Section 13 of the Act to Regulate Commerce (as amended by Sec. 416 of the Transportation Act) and conduct an investigation of intrastate rates.

After such an investigation the Commission found that the lower intrastate rates in a number of states created a discrimination against interstate commerce and exercised its authority by applying the interstate rates to intrastate commerce (*New York* case, reported in 59 I. C. C. 290). This action was resisted by a large number of states as an invasion of states' rights in the exercise of their police power. In some instances suits were brought in the state courts, either by the railroad companies to restrain the enforcement of the intrastate rates, or by the states to restrain the railroad companies from adopting the interstate rates. In other instances suits were brought in the federal courts (as in the *Wisconsin Rate Case*) by the railroad company to enjoin the interstate rates, and in other instances (like the *New York* case) the state filed a

bill in equity to restrain the enforcement of the interstate rates. While there were several of these cases before this court on appeal, either from state or federal courts, the merits of the controversy were disposed of by the decision in the *Wisconsin* case.

Decisions.

In *Railroad Commission of Wisconsin* v. *C. B. & Q. R. Co.* (257 U. S. 563, 66 L. ed. 371) and *State of New York* v. *United States* (257 U. S. 591, 66 L. ed. 385), this Court held that state regulations requiring intrastate rates lower than the interstate rates between the same points on competing lines were unlawful under this section because they discriminated against interstate commerce.

It was shown in the *Wisconsin Rate Case*, only about 20 per cent. of the carriers' freight business is intrastate commerce. This proportion applies equally to the railroad of the plaintiff. If it is to have its fair return, the money to pay for such improvements as the one in question must come largely from interstate commerce, and if the plaintiff can be required to spend from $120,000 to $175,000 for the elimination of this crossing, in excess of the reasonable requirements, and if the same can be required of it in any number of cases in New Jersey and elsewhere, it is obvious that the shippers from all parts of the country must contribute toward the payment of an excessive expenditure for the elimination of a grade crossing at Royce Valley in conformity with the preference of local residents and for the convenience of private travel on Highway Route No. 16, since the rates must be sufficiently high to yield a fair return on the aggregate value of property devoted to transportation service, and the Interstate Commerce Commission must boost interstate rates to accomplish the purpose of the Transportation Act.

The Chief Justice said in the *Wisconsin* case, that the plaintiff must have "a reasonably compensatory return *for all the work* it does."

At the time the *Paterson Grade Crossing* case arose there was no law forbidding discrimination against interstate commerce. That was an innovation introduced in Section 13 of the Act to Regulate Commerce by Section 416 of the Transportation Act and forbid—

> "any undue, unreasonable or unjust discrimination against interstate or foreign commerce *which is hereby forbidden and declared to be unlawful.*"

So this, too, is a point that was not and could not have been raised under the law as it stood at that time. The above-quoted prohibition applies not only to rates, but also to any "*regulation, or practice*, made or imposed by authority of any state." Certainly an order for the elimination of grade crossings is a "regulation" of the carrier in any acceptance of the term.

We contend that the principle declared and established by this Court in the rate cases applies equally to any other "regulation" by a state or state authority. This order of the Board of Public Utility Commissioners, by unnecessarily adding from $120,000 to $175,000 to the reasonable cost of this structure, creates an undue and unreasonable prejudice and an unjust discrimination against and burden upon the interstate and foreign commerce of the appellant.

It is not a sufficient answer to this contention to say that the amount in this individual instance is relatively small. The principle is the same regardless of amount, if, as in this case, the amount is substantial. If such an order can be lawfully made in one instance, it can as well be lawfully made in a hundred or a thousand instances. The wrong is not only in the amount involved in this case, but also in the potential effect of such

orders and their possible multiplication. It is not even necessary that this order shall actually increase rates or impair the fair return. It is equally bad if such is the tendency of this order.

Applying the principle of the Wisconsin decision to our case, if the plaintiff is to earn a fixed net percentage of income, the more of that income that is taken away from it, beyond the reasonable requirements of public convenience and necessity, the higher the (intrastate as well as) interstate rates may have to be. Herein lies the prejudice and discrimination against interstate commerce which, by the Act as above quoted, "*is hereby forbidden and declared to be unlawful, • • • the law of any State or the decision or order of any State authority to the contrary notwithstanding.*"

It is not necessary in this case to argue that a state may not require the elimination of a dangerous grade crossing. It is sufficient to urge that such authority be exercised with due regard to the requirements of reasonable expenditures. If the duty of appellant and the reasonable requirements of public safety and convenience will be adequately fulfilled by the adoption of Plan "C" as enlarged at a cost of $205,000, the state has no right to require the Board's plan at a cost of $324,400.

For these reasons it is respectfully submitted that the order of the Board violates the Commerce Clause of the Constitution and the Act to Regulate Commerce, by requiring the appellant to make unreasonable expenditures for structures and maintenance and by constituting a regulation of its interstate commerce amounting to an undue, unreasonable and unjust discrimination against the same by imposing thereon unreasonable and arbitrary requirements and burdens.

II.

The Order of the Board violates the Constitution by impairing the obligation of the contract previously made between the Appellant and the State Highway Commission for the alteration of the grade crossing in question.

The jurisdiction of the District Court, and of this court on appeal, extends to the determination of all questions involved in the case, including questions of State law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all.

> *Green* v. *Louisville & Interurban R. R. Co., Green* v. *Louisville Railway Co.*, 244 U. S. 499, 508; 61 L. Ed. 1280, 1286;
>
> *Louisiana P. S. Com.* v. *Morgans L. & T. R. & S. S. Co.*, 264 U. S. 393; 68 L. Ed. 756, 757;
>
> *A. C. L. R. R. Co.* v. *Daughton*, 262 U. S. 413, 416; 67 L. Ed. 1051, 1058;
>
> *Towne* v. *Eisner*, 245 U. S. 418, 426; 62 L. Ed. 372, 376;
>
> *Moy* v. *U. S.*, 254 U. S. 189, 191; 65 L. Ed. 214, 217;
>
> *C. G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 97; 69 L. Ed. 183, 188.

The first consideration under this point is the relative power and authority of the Board of Public Utility Commissioners and of the State Highway Commission.

Authority of the Board.

It is well settled that when bodies are created for the regulation of utility companies the presumption is that the power of regulation conferred does not extend beyond the express terms of the legislative grant.

> *Passaic, &c. Water Co.* v. *Board*, 139 Atl. Rep. 324 (N. J. Sup. Ct.), affirmed by the N. J. Court of Er. & Ap., 41 Atl. Rep. 921;

N. Y. S. & W. v. *Board*, 90 N. J. L. 432 (N. J. Sup. Ct.), affirmed by N. J. Court of E. & A. in 91 N. J. L. 701);

87 N.J.L. 128

P. S. Elec. Co. v. *Board*, ~~95 Atl. Rep. 707~~ (N. J. Sup. Ct.), affirmed by N. J. Ct. E. & App., 88 N. J. L. 603;

Potter v. *Board*, 89 N. J. L. 157 (N. J. Sup. Ct.).

The Fielder Act (which is printed in full in Appendix "B") applies only to crossings upon highways under the jurisdiction and control of a municipality.

Section 3 provides that

> "The expense of removing, relaying or relocating any municipal water or sewer pipes, or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same and also the expense of paving, curbing and flagging the highway constructed as the result of the change of grade."

For this reason Section 5 provides that a petition, on behalf of a municipality, shall be presented by "the board or body having charge of the finances of any *municipality* wherein *such crossing* exists."

In *Curtis & Hill Co.* v. *State Highway Commission* (91 N. J. E. 421) the New Jersey Court of Chancery expressly held that the New Jersey State Highway Commission is *not* a "municipality."

There is no provision in the Fielder Act pertaining or appropriate to a crossing on a state highway over which the State Highway Commission has exclusive control. It would be an unwarranted stretching of the act to hold that it authorized a municipality to present a petition for the elimination of a state highway crossing over which it had no jurisdiction or control, or to hold that the act gave the Board authority to assume jurisdiction on its own initiative over a crossing on a state highway and thereby usurp

control of a subject which the legislature has placed in the exclusive control of a department of the state itself.

The act does not authorize the State Highway Commission to petition the Board for the elimination of a crossing on a state highway, nor did the legislature confer such power upon the Highway Commission in the Highway Department or Highway System Acts. In those acts the legislature conferred such powers for the elimination of grade crossings as it deemed proper. It is significant that during the ten years that have elapsed since the creation of the present State Highway System and the State Highway Commission the Board has not heretofore assumed such jurisdiction, nor has the State Highway Commission found it necessary to apply to the legislature for greater authority over grade crossing eliminations than were conferred in the first enactment of the State Highway Acts.

If it had been the intention of the legislature to make the Fielder Act applicable to crossings on county or state highways it would have used language appropriate and adequate for the purpose, both of which classes of highways existed when the Fielder Act was passed.

That the legislature never intended to give the Board jurisdiction to order the elimination of crossings on state highways, is shown by the fact that it has never amended the Fielder Act to include such authority, and it did not include such authority in the State Highway Department Act or the State Highway Commission Act, either in their original enactments or in any of the numerous amendments subsequently enacted.

On the contrary, the State Highway statutes cited *infra*, gave the State Highway Commission, by express terms, exclusive jurisdiction and control over the elimination of grade crossings on state highways.

Authority of the State Highway Commission.

The State Highway Commission possessed full power and authority to enter into an agreement with the appellant.

An act of the legislature of New Jersey entitled "An Act to establish a State Highway Department and to define its powers and duties; vesting therein all the powers and duties now devolved by law, upon the Commissioners of the Public Roads, and the existing State Highway Commission and Highway Commission," approved March 13, 1917. (N. J. P. L., 1917, p. 35), created and established a State Highway Commission consisting of four members, with power to elect a State Highway Engineer and other officers and providing, other things, as follows:

> Sec. 1. "A State Highway Department is hereby established and the same shall be governed by a board to be known as the State Highway Commission, * * *" (2 Cum. Supp. 3088).
>
> Sec. 8. "The State Highway Department shall succeed to and exercise all the powers and perform all the duties now exercised or performed by or conferred and charged upon the State Commissioner of Public Roads or upon the existing State Highway Commission, by virtue of any existing law or laws, *and shall have full control and direction of all projects and work on State highways*" (2 Cum. Supp. 3090).
>
> Sec. 10. "The work of the department shall be performed under the State Highway Commission *which shall have all power necessary therefor*, without recital in detail. *All action shall be determined by the State Highway Commission by the vote of a majority thereof*" (2 Cum. Supp. 3091).
>
> Sec. 12. (As amended by Chapter 204, P. L. 1923, p. 521) provides: "In addition to and not in limitation of its general powers, the State Highway Commission shall have power:
>
> a. To determine and adopt rules, regulations and specifications and to enter into contract cover-

ing all matters and things incident to the acquisition, construction, reconstruction, maintenance and repair of state highways.

b. To execute and perform as an independent contractor, or through contracts made in the name of the State of New Jersey, all manner of work incident to the maintenance and repair of state highways.

* * * * * * * * *

e. To construct, build, improve, widen, straighten and regrade any state highway and for such purpose and for any use incident thereto, or connected therewith, to acquire any lands, bridges or approaches thereto, and rights therein by gift, devise, purchase or by condemnation * * *" (2 Cum. Supp. 3091).

"*To do and perform whatever may be necessary or desirable to effectuate the object and purposes of this act.* To do and perform all acts now required by law to be done and performed by the State Commissioner of Public Roads, the State Highway Commission or the Highway Commission. *The powers are to be liberally construed*" (2 Cum. Supp. 3091, 3092).

The State Highway System over which this act gives the State Highway Commission "full control and direction," was established by an act of the legislature entitled "An Act to establish a State Highway System, and to provide for the improvement, betterment, reconstruction, resurfacing, maintenance, repair and regulation of the use thereof," approved March 13, 1917 (N. J. P. L., 1917, p. 25), which provides among other things, as follows:

Section 1, (as amended by Chapter 104, approved April 6, 1920, P. L., 1920, p. 221):

"1. The State Highway Commission shall, as soon as practicable, lay out routes for a State Highway System as follows: (2 Cum. Supp. 3074).

* * * * * * * * *

Route No. 16. From Morristown to Trenton by way of Van Dorn's Mills, Bernardsville, Far Hills,

Bedminister, Pluckemin, Somerville, South Somerville, Belle Mead and Harlingen" (2 Cum. Sup. 3075, 3076).

* * * * * * * * *

"Existing highways may be made use of wherever it is convenient so to do, but the commission may lay out, open and improve new roads over acquired rights of way and may also lay out routes in continuation of conecting with, or in addition to the routes above specified" (2 Cum. Supp. 3077).

Section 3 (as amended by Chapter 220 of the Laws of 1919, approved April 15, 1919, P. L., p. 511) provides:

"3. When, in its discretion, it shall see fit so to do, the State Highway Commission shall * * * determine by resolution whether any routes, route or parts thereof, if any, shall be taken over as a State Highway, and shall notify such governing body of such action. Upon the passage of such resolution, such routes, route, or parts thereof, shall become a State Highway, and its further improvement, maintenance and repair shall be at the expense of the State under the jurisdiction of the State Highway Department" (2 Cum. Supp. 3077).

Pursuant to this authority the State Highway Commission, on April 12, 1920, passed a resolution to take over from the County of Somerset, that portion of State Highway Route No. 16, lying within the limits of said county (R. 134). On August 3, 1920, a notice was sent by the State Highway Commission to the Board of Chosen Freeholders of Somerset County of its resolution to do so (R. 130). The portion described as the "Second Parcel" (R. 132) embraces the railroad grade crossing in Hillsborough Township involved in this suit.

Section 6 of the act (as amended by Chapter 220, Laws of 1919, p. 511, 512 *supra*) provides:

"6 * * *. All * * * railroad grade crossings shall be eliminated wherever practicable."

"7. The State Highway Commission shall take charge of all work on State Highways and main-

tain the same in good order. *All work of improvement, betterment, reconstruction* or resurfacing *shall be done in accordance with plans* and specifications *prepared by the State Highway Department* * * *" (2 Cum. Supp. 3079).

Section 10, provides:

"In the construction, repair and maintenance of Highways forming a part of the State Highway System, the said Commission shall possess and exercise in addition to those conferred by this act, all those rights and powers not incompatible with its functions nor prohibited by law which are now exercised by overseers of roads and Boards of Chosen Freeholders in road construction, repair and maintenance" (2 Cum. Supp. 3080).

Once before, in January, 1923, the Board had undertaken to order the elimination of the grade crossing at Route No. 16, but as soon as that information was brought to the attention of the State Highway Commission, it asserted the authority of its own exclusive control over the highway and authorized its Engineering Department to negotiate an agreement with the appellant for its elimination. That was the initiation of the negotiations which resulted in the agreement which appellant claims was consummated. The Board did not undertake to pursue its order but yielded to the authority of the State Highway Commission, at least until November 24, 1926, when it made another order instituting the proceedings in which the present order was made (R. 135, 136).

Acting under the authority of these statutes the State Highway Commission, on January 10, 1923, adopted a resolution directing its Engineering Department to open negotiations with appellant looking toward the elimination of this crossing (R. 135). These negotiations continued until March 11, 1924, when the State Highway Engineer presented for the consideration of the Commission alternate schemes and recommended the adoption of Plan "C"

at a total cost of $109,024.00, involving a structure with a center pier in the highway, leaving 18′ of roadway on each side of the pier, the appellant to share in the cost of this improvement to the extent of $40,000.00. Thereupon, by motion duly carried, the State Highway Commission approved Plan "C" and directed that the elimination of this crossing be proceeded with and that $40,000.00 be accepted from appellant as its proportionate share of the cost (R. 136).

Section 11 of the State Highway System Act provides:

> "It shall be lawful for the State Highway Commission to enter into written agreement with * * * any person or corporation for co-operation in any work, and to assume any portion of that cost" (2 Cum. Supp. 3080).

Section 19 of the same Act defines "Work" as follows:

> "WORK: The acquisition of land for any purpose connected with highways by lease, gift, purchase, demise, or condemnation, for temporary or permanent use; the laying out, opening, construction, improvement, repair and maintenance of highways; the building, repair and operation of bridges; * * * *the elimination of grade crossings,* * * * and all other things and services necessary or convenient for the performance of duties imposed by this act" (2 Cum. Supp. 3084).

These acts were all passed subsequent to the enactment of the Public Utilities Act and Fielder Act and confer upon the State Highway Commission *full control and direction of all projects and work of state highways,* including (expressly) the elimination of grade crossings.

Decisions under the Highway Acts.

The nature and extent of the powers and duties of the State Highway Commission by virtue of the statutes relating thereto, have been defined and discussed in the following cases in the New Jersey courts:

Curtis & Hill Co. v. *State Highway Commission*, 91 N. J. Eq. 421, 111 Atl. 16;

Haycock v. *Jannarone*, 99 N. J. L. 185, 122 Atl. 805;

Goodavage v. *State Highway Commission*, 96 N. J. Eq. 424; 125 Atl. 919;

Everett W. Cox Co. v. *State Highway Commission*, 133 Atl. 419;

Taylor-White Extracting Co. v. *State Highway Commission*, 136 Atl. 183;

State Highway Commission v. *City of Elizabeth*, 140 Atl. 335;

Roman Catholic Diocese of Newark v. *McGovern*, 142 Atl. 349.

In the *Curtis & Hill Co.* case a bill of complaint was filed in the Court of Chancery of New Jersey under the municipal Mechanics' Lien Law for the purpose of enforcing an alleged lien by a sub-contractor on moneys due from the Commission to a contractor who had the contract for constructing the highway. The question was whether the State Highway Commission was a "municipality." The Court of Chancery held that it was not, saying:

> "That the state highway commission is an alter ego of the state, and not a mere subordinate, is so clear as to need little discussion. The statute (P. L. 1917, p. 35, sec. 1) creates a state highway department, to 'be governed by a board to be known as the state highway commission.' The members of the commission are the Governor himself, ex officio, and eight members appointed by the Governor by and with the advice and consent of the Senate.

> The contracts made by the commission are clearly contracts of the state; they may be made either in the name of the state or of the commission. The funds expended for its work are the funds of the state, and expended through the usual state channels. The work which it is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, *not merely in or for the benefit of any particular locality or the citizens thereof.* The work done under its contracts by these laborers and materialmen is work done 'in the state,' and not in any 'municipality in the state,' notwithstanding that each particular piece of work must necessarily have a locus within the geographical limits of one or more municipalities or the territory governed thereby."

In the *Everett W. Cox Case* the New Jersey Supreme Court said:

> "The state highway commission is given power 'to do and perform whatever may be necessary or desirable to effectuate the object and purpose of the act.' It further provides that these powers are to be liberally construed. • • • This act further provided that the work of the department shall be performed under the state highway commission, which shall have all power necessary therefor without recital in detail.
>
> • • • • • • • • •
>
> The state highway commission can build any kind of a thoroughfare it desires."

In the *Elizabeth Case* injunction was sought by the Commission to restrain the city from interfering with the construction of Route No. 25 through the city and from interfering with entry upon lands owned by the city which were required for the highway. After the Commission had begun the work of constructing the highway its employees were arrested, the work was stopped and the bill was then filed for injunction. The principal claim of the city was that the Commission had no power to condemn

lands of a municipal corporation which were already in use for public purposes—at least in the absence of express legislative authority or necessary implication therefrom.

The city's claim was overruled and injunction was allowed. The Court, after quoting the statute and referring to the *Curtis & Hull Co. Case, (supra)*, said:

> "Therefore, when the State of New Jersey through its Legislature says that the state highway commission shall have power 'to do and perform whatever may be necessary or desirable to effectuate the object and purposes' of the act of its creation, it is but another way of saying: 'You are our agent and representative; and we invest you with all of our powers in furtherance of the objects and purposes for which you are created and this declaration of authority shall be liberally construed.' What more could be asked? By what language could broader powers be given? Under these terms the state highway commission might well say, in the words of a famous French monarch, 'L' Etat c'est moi.' The state highway commission is not a separate and distinct entity upon which the power of eminent domain has been referred, but it is to all intents and purposes, and within the scope of its authority, the state itself; and its powers within the sphere of its activities are limited only by the powers of the state."

In the *Diocese of Newark Case* the New Jersey Supreme Court, after referring to the statutory provisions, held:

> "This provision contains the necessary 'special permission' required by the Cemetery Act, but is also equivalent to a mandate to the commission to pursue such course as may be necessary for the practical and economic execution of the legislative purpose."

These decisions clearly indicate that the Courts of New Jersey consider that the legislation relating to the construction of State Highway routes supersedes all prior legislation which is in any way in conflict with the highway statute, and confers upon the State Highway Commission,

exclusively, all of the sovereign's powers relating thereto, including the elimination of grade crossings thereon.

On March 13, 1924, the State Highway Engineer advised the Chief Engineer of appellant of the State Highway Commission's resolution to proceed with the work of eliminating said grade crossing on the basis therein provided, in accordance with Plan "C," and asked appellant to draft an agreement in writing for that purpose. Appellant thereupon prepared a complete set of detailed plans for the relocation and reconstruction of said crossing in accordance with Plan "C" and incurred therein an expense of approximately $2,800 (R. 38).

On April 22, 1924, the Commission considered an objection from the Somerset County Board of Freeholders to the relocation of the highway, under Plan "C," and thereafter resolved "that the Somerset County Board of Freeholders be advised that *the action in adopting this new line had already been taken by the Commission* on account of the considerable saving that would be affected thereby, and the further fact that the curve involved was only a six degree curve, which is not considered serious by the State Highway Commission, and also the fact that a much shorter under-pass and speedier construction would be accomplished by means of the new line as adopted" (R. 137).

On June 18, 1924, the Commission received a report from Commissioner Jelin on a hearing held June 11, 1924, to consider local objections to the relocation of the highway. He stated that protests were made against the proposed alignment of Plan "C"; that a feeling was expressed that the Railroad Company was to be benefited by that plan; that he corrected this impression by advising that the Railroad Company was to contribute $40,000 toward the improvement; that he also explained to the residents that if a straight line was adopted for the route

there would be an additional 42 feet of covered roadway over that proposed; that it was pointed out that there are other points on this route where the curvature is 6 degrees or more; that the residents and Freeholders recommended that the crossing should be straight "even though there was involved in this case an expenditure of $40,000.00 by the State" (R. 138).

On June 24, 1924, after a discussion of these objections, Commissioner Stewart stated that public hearings had been held, and "no additional facts not already before the State Highway Engineer or State Highway Department were produced which would lead the Highway Commission to alter its opinion in regard to the advisability of the change as contemplated in the original plans." It was thereupon resolved "that the plan as drawn, not only from an engineer's standpoint, but because of a saving of money and because they are already prepared, be proceeded with and a copy of the action of this meeting be forwarded to Senator Case," who represented the objectors (R. 139).

On June 25, 1924, the State Highway Commission approved Plan "C," after flattening the highway curves, to 6 degrees, and sent the plan of alignment and profile of approaches to appellant who immediately accepted and adopted it (R. 38).

This plan without the detail drawings was offered by appellant before the Board as "Exhibit R R 1" and appears in this case as "Exhibit C" (R. 129).

On October 14, 1924, the Chief Engineer of appellant sent to the State Highway Engineer a draft of agreement covering the proposed elimination in accordance with Plan "C," with the curves flattened as requested. On October 17, 1924, complete detailed and general plans were forwarded by appellant to the State Highway Engineer for his approval and on November 11, 1924,

he sent to the State Highway Engineer for approval the official blue prints of the plan, dated November 8, 1924, duly approved and executed on behalf of the appellant and signed by George T. Hand, its Chief Engineer, and F. A. Schall, its Bridge Engineer (R. 39).

The State Highway Commission suggested certain minor changes in the draft of agreement submitted by appellant on October 14, 1924. These changes were accepted by appellant and on December 12, 1924, the plans were approved and adopted on behalf of the State Highway Commission and signed by W. G. Sloan, State Highway Engineer, and John A. Vogel, Bridge Engineer (R. 39). Blue prints of these plans were offered in evidence in this case as Exhibit "F" (R. 145-150). In order to expedite the progress of the work, appellant, pending these negotiations, proceeded to take up and relay cross-over tracks and do other preliminary work on the ground, at an actual expenditure of $2,194.13 (R. 38, 39).

Yielding to the influence of the objectors to Plan "C," the Commission, at a meeting held March 24, 1925, adopted a motion that the State Highway Engineer be instructed to make application to the Public Utility Commission for an order requiring the plaintiff to eliminate the crossing (R. 143). There was no suggestion or recommendation as to plans to be presented to the Board of Public Utility Commissioners and no action was ever taken changing the plan recommended by the State Highway Engineer and adopted by the Commission on March 11, 1924, and signed December 12, 1924. No action was taken to change or rescind the agreement theretofore approved by the State Highway Commission and no record appears of any application to the Board. Appellant was not advised of this action and it was not until June 1, 1925, that appellant received any advice or notice from the State Highway Commission that it would refrain from signing the formal written agreement for this work (p. 39).

Under Section 12 of the State Highway Department Act (*supra*) the State Highway Commission was empowered to enter into that agreement and bind the State of New Jersey, and this power, according to the language of the act, and the foregoing decisions is to be "liberally construed." The State Highway Commission, which these decisions say is "the state itself," has made an agreement with the appellant under which the grade crossing on Highway Route No. 16 was to be eliminated at a cost to appellant of $40,000.00; a creature of this State (the Board of Public Utility Commissioners) has made an order, the effect of which was not only to abrogate that agreement and require appellant to eliminate this grade crossing (and another) at an expense to appellant of $324,400.00 exclusive of the cost of acquiring the necessary land for 1940 feet of connecting roadway and exclusive of consequential damages, if any, to owners of abutting property, and thereafter pay the interest charges and the cost of maintenance on the increased expenditure, but also to direct its creator (the State) to do and perform certain things hereunder (R. 116, 121, 178).

Plan "C" was recommended by the State Highway Engineer and approved by the appellant (R. 136). The six blue prints all dated and signed by two representatives of each party (Exhibit "F," R. 145-150) comprise the general and detailed plans for the job. The notations on these plans not only show the character, dimensions and design of the structure, but they also show detailed specifications as to waterproofing, preparation and use of cement, size and character of materials and other explanatory details, including an itemized list of quantities, sizes, dimensions, locations, weight and use of material specified in classes, full engineering data and how various parts are to be spiked and fastened and every other detail necessary to enable a contractor to take the plan and carry out the job in accordance therewith. These plans also contain notes describing specifications and test quali-

ties of all materials to be used, including concrete, reinforced steel, reinforced bars, waterproofing and steel material, and explain how the concrete is to be poured and how the other materials are to be constructed and used with details of every joint, part or piece and diagrams of reinforcing and other operations.

These blue prints and the agreement as to who should do the work and the offer and acceptance of a contribution of $40,000 to be paid by the appellant toward the cost of the work, effected a complete and binding contract between the parties for the elimination of the grade crossing of Highway Route No. 16 and appellant's railroad, at the place in question, in accordance therewith. Acting on the good faith of this agreement, appellant prepared the detail plans and began the work of making physical changes in its railroad tracks, preliminary to carrying out the plan, and expended thereon approximately $5,000.

The proceeding instituted by the Board on its own motion, and its order made therein impair the obligation of that contract, which was made after full investigation and by solemn resolution, pursuant to the authority of the statute in such case made and provided.

Decisions as to Contracts.

In *Wharton* v. *Stoutenburgh* (35 N. J. E. 266), the Court of Errors and Appeals reviewed a decree of the Court of Chancery directing the execution of a lease in specific performance of agreement to lease certain mining lands. There had been some correspondence between the parties regarding the leasing of these lands and the lease had been prepared. The lessee had entered into possession of the premises but afterwards refused to execute the lease. The Court said:

(p. 274):

"The terms of the contract must be established by proofs, clearly, definitely, and unequivocally.

> But it is sufficient that the terms of the contract be made out in a manner satisfactory to the Court. The fact that the details of the agreement are controverted by the parties will not deter the Court from ascertaining what the terms of it really were, and giving effect to the agreement where a complainant shows himself to be entitled to a specific performance, by a part performance, which shall be referable only to a part execution of the agreement."

Applying the decision in that case to the facts in our own case, we find that while the resolutions of the State Highway Commission authorized elimination of the crossing by the plan agreed upon between and signed by the parties, nowhere is there a suggestion in the minutes and resolutions of the State Highway Commission that there was to be an agreement in writing. The details of material and construction are so completely shown on the face of the blue prints that there was nothing remaining for agreement between the parties. The plans were signed by both parties and the appellant began the work. No change was ever afterwards requested by the State Highway Commission either in the plans or in the form of the agreement, although the formal written agreement was never signed by the State Highway Commission (R. 39).

In *Donnelly* v. *Currie Hardware Co.*, 66 N. J. L. 388, the Supreme Court held that no contract had been made between the parties but it cited the decision of the Court of Errors and Appeals in *Water Commissioners* v. *Brown* (32 N. J. L. 504) from which is quoted (at p. 389), the following:

> "If it appears that the parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, *so long as the contract remains without any acts done under it on either side.*"

In *Trenton and Mercer County T. R. Co.* v. *Trenton*, (90 N. J. L. 378), it was contended on behalf of the Railway Company that the terms of an agreement could not be enforced against it because the agreement had not been actually signed. In that case negotiations had been conducted between the Railway Company and the City of Trenton. The directors of the Railway Company passed a resolution authorizing the agreement. On the strength of this authority the City of Trenton passed an ordinance authorizing execution of the agreement on behalf of the city. Afterwards the directors of the Railway Company rescinded their resolution.

The Supreme Court cited *Wharton* v. *Stoutenburgh*, *supra*, and held that the principle of that case applied also in the case then before the Court, saying:

> "The draft agreement had been submitted by the city to the company; the company had assented to its terms; all that remained was for the executive officers to execute the written instrument in which the terms of the agreement were set forth; but the officers had no power to vary the terms, and it was not contemplated that the directors should again pass on the matter."
>
> • • • • • • • • •

(p. 383):

> "We think there was a valid contract • • •"

In *McCulloch* v. *Lake & Risley Co.* (91 N. J. L. 381), the Supreme Court held that where the plaintiff leased a property to the defendant on terms orally agreed to and the plaintiff had sent a check for the first payment, that, although the lease had not been executed, a valid agreement had been made.

In *Mente & Co.* v. *Heller* (99 N. J. L. 475), it appeared that a contract had been negotiated between the parties by correspondence about which there was no dispute except that the respondents contended that this correspon-

dence did not constitute a contract since a written contract was later to be executed and delivered.

After quoting from the case of *Bettcher* v. *Knapp* (94 N. J. E. 433), the Court of Errors and Appeals held (p. 477):

> "We find nothing in the case before us indicating that a formal written contract was an essential part of the negotiations between the parties."
>
> • • • • • • • • •
>
> "In the case before us we find no ambiguity; no conflicting testimony as to the several letters and telegrams asserted as making for the alleged contracts and nothing that indicates that a formal written contract was an essential part of the negotiations between the parties to make the contracts complete."

In *Levine* v. *Lafayette Building Corporation* (142 Atl. Rep. 441), in the Court of Chancery, where all of the previous decisions are reviewed, there was involved the question of the validity of a memorandum which expressly provided, "formal contract to be signed on or before September 1, 1925" (p. 1200). After an exhaustive discussion of the authorities, it was held that even though one of the parties refused to execute the formal contract there nevertheless existed a binding agreement between the parties for the sale of lands. The decision was rested upon the finding that the proofs did not disclose that any material provisions were to be inserted in the "formal contract to be signed," which were not contained in or to be inferred from the *preliminary informal agreement* (p. 1202). The Court also found that subsequent to the execution of the preliminary agreement the complainant had paid to the defendant on account of the transaction, the sum of $4,000 which the Court held "waived the 'signing of the formal contract'" (p. 1200) and that the defendant had received the benefit of this payment.

There are numerous other cases, which are collated in 13 C. J. 305 and in Vol. I, Williston on Contracts, Sec. 28, p. 36. The general principle is stated by Williston as follows:

> "• • • the intention to make a legal obligation is not necessary for the existence of a contract though an expressed intent that there shall be no legal obligation is effective to prevent one. In the absence of such an expressed intent, mutual assent, informally given, to make an exchange of acts or promises is sufficient. Consequently, if such assent exists, to avoid the conclusion that a contract has been formed it must be found as a fact that the parties impliedly agreed that until the writing was executed they should not be bound. The burden of establishing this implication of fact is on the one who denies the existence of a contract. The decisions although not all perfectly consistent, generally conform to this test."

One of the cases cited by Williston is *Friedman* v. *Schleuter*, 105 Ark. 580; 151 S. W. 696; suit was brought to recover damages for breach of a building contract. The defendants advertised for bids according to plans and specifications which gave full details as to materials and dimensions. Plaintiff was the successful bidder and complied with all the conditions of the bid, but the formal contract was never executed. The defendants claimed that the contract was not complete because the advertisement and the specifications did not provide the time for payment or for the completion of the work. The court sustained a verdict for plaintiff, saying:

> "It appears • • • that all the terms of the contract were agreed upon, and its reduction to writing was intended merely for facility of proof as to its terms. In such case the provision for a contract in writing is not inconsistent with the present contract, and this is especially true in a case where the things to be done are provided in written plans and specifications, which are so definite

> and detailed as to present a perfect guide as to the rights and duties of the respective parties in the erection of the proposed building."

So, here, all the terms of the details of the contract had been settled by the negotiations between the Highway Commission and the appellant and reduced to writing, and carefully and minutely drafted into and upon the detail plans, which were then approved and signed by the duly authorized officers of the State, pursuant to the express authority of the statute. On the faith of this contract appellant actually began the work and expended a substantial sum of money thereon—then comes a subordinate agency of the State having no express authority under any statute, but purporting to act under a supposed implied authority of a statute passed fourteen years before the State Highway Commission was created, and takes the entire project out of the hands of the State's "*alter ego*" and orders a different plan of its own, which has not the approval of the department of the State having express and exclusive jurisdiction over the subject.

Obligation of the State.

Having exercised the power under Section 12 of the State Highway Department Act, to enter into an agreement with the appellant for the elimination of this crossing, this agreement, under the provisions of the same section, was binding upon the State of New Jersey.

It is well settled that the state may make an agreement and be bound thereby in the same manner as a private individual.

In *Fletcher* v. *Peck* (10 U. S. 87, 3 L. ed. 162), this court reviewed the action of the legislature of the State of Georgia in which it attempted by an act to divest certain persons of title theretofore granted by contract with the

state. In an opinion delivered by Mr. Chief Justice Marshall this court held that the act in question impaired the obligation of the previous contract and therefore violated the Constitution of the United States.

In *Trustees of W. & E. Canal Co.* v. *Beers* (67 U. S. 448, 17 L. ed. 327), this court considered an act of the legislature of proposing a composition with the creditors of the state who were the holders of bonds of a canal built by the state. This court held (p. 456):

> "Our construction of these Acts is supported by the facts that the state could not destroy the lien if she had designed to do so; that it was reasonable and just that she should protect a lien the sufficiency of which she had guaranteed, and that the plain and natural import of the language used, justifies this interpretation of the legislative intent."

In *Davis* v. *Gray* (83 U. S. 203, 21 L. ed. 447), this court considered an act of the legislature of Texas affecting a railroad company incorporated under a land grant, including an agreement to build a railroad. This court held (p. 232) as follows:

> "When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. Curran *v.* Arkansas, 15 How. 308."

In *Hall* v. *Wisconsin* (103 U. S. 5, 26 L. ed. 302), this court considered an act of the legislature of Wisconsin authorizing the governor to enter into an agreement on behalf of the state with certain persons to make a geological, mineralogical and agricultural survey of the state. The State undertook to abrogate an agreement made under this authority with one Hall. This court quoted

the following from Justice Story's opinion in *Dartmouth Coll.* v. *Woodward* (4 Wheat. 694), at page 11:

> "But when the legislature *makes a contract* with a public officer, as in case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

—and held (p. 11):

> "When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly." *Davis* v. *Gray*, 16 Wall. 203 (83 U. S., XXI, 447).

In *Pennoyer* v. *McConnaughy* (140 U. S. 1, 35 L. ed. 363), it appeared that the legislature of the State of Oregon had passed an act authorizing the sale of swamp lands belonging to the state, which act the courts held amounted to an offer to sell such land under the conditions specified in the act. The appellant's predecessor in interest filed an application under the act but the first payment of 20% of the price was deferred by failure of the state authorities to complete, approve and file the maps and descriptions of the lands. Meanwhile, and before this was done, an act was passed and went into effect repealing the previous act. This court held that even though no consideration had been paid for the agreement of sale of land (due to the action of the state), the purchaser, nevertheless, acquired a vested interest in the property and a contract with the state for its conveyance to him, the obligation of which was impaired by the repealer which provided that certificates of sale should be cancelled where the 20% of the price had not been paid prior to a certain date therein mentioned. This court held (p. 25, 140 U. S.):

> "That legislation surely impaired the obligation of the contract Owen had with the state, for its effect was to destroy valuable property rights and privileges belonging to him. It was therefore vio-

lative of the Constitution of the United States. Art. 1, Sec. 10."

In *Louisiana P. S. Com.* v. *Morgans L. & T. R. & S. S. Co.* (264 U. S. 393, 68 L. ed. 756), this court reviewed an order of the Louisiana Commission directing the railroad company to repair a viaduct carrying a street over its railroad in New Orleans. The order was challenged on the ground that it was beyond the power of the commission and if within such power, enforcement would deprive the company of property without due process of law, and impair the obligation of its contract with the City of New Orleans, wherein the railroad company granted to the city the right to construct the viaduct over its right-of-way and twenty tracks upon the express condition that the city should pay for both erection and subsequent maintenance. The Commission claimed that it had power to make the order under the section of the Louisiana constitution, printed in full at page 398, of the Supreme Court's opinion, and that the state Supreme Court had so held in a case therein cited. Other provisions of the Louisiana constitution created the government of the City of New Orleans. This court held (p. 399):

> "Unless and until otherwise advised by the supreme court of Louisiana, we must conclude that the general control of its own streets is an ordinary governmental function of the city of New Orleans.
>
> It would require more definite language than we find in the Constitution of 1921, or in Gulf, C. & S. F. R. Co. *v.* Louisiana Pub. Serv. Commission, to convince us that the commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its property, is not denied. Only very clear and definite words would suffice to show that

the state had undertaken to authorize a thing so manifestly unjust and oppressive."

In *Missouri, etc. Ry. Co.* v. *State of Oklahoma*, 271 U. S. 303, 70 L. Ed. 957, this Court reversed a decision of the Supreme Court of Oklahoma which had affirmed an order of the Corporation Commission of that state requiring the railroad to eliminate a grade crossing. The decision was put on the ground that an agreement had been made by the city to bear the cost of constructing the highway, in consideration of the donation of the right to cross by the railroad; that such agreement was valid and that the order of the commission requiring the railroad to bear the cost of eliminating the crossing impaired the obligation of the contract and deprived the company of its property without due process of law.

Article I, Section X, paragraph 1, forbids a state to pass any law impairing the obligation of contracts. An order of the Board of the Public Utility Commissioners of New Jersey made under authority (or color of authority) of the State Public Utilities Act, is a law of the State within the meaning of this provision of the United States Constitution.

Williams v. *Bruffy*, 96 U. S. 176; 24 L. Ed. 716;

L. E. & W. R. Co. v. *State Pu. Com.*, 249 U. S. 422, 424; 63 L. Ed. 684, 687;

Standard Computing Scale Co. v. *Farrell*, 249 U. S. 571, 577; 63 L. Ed. 780, 782;

King Mfg. Co. v. *Augusta*, U. S. S. C. Adv. Op. ~~May 292, decided (May 14, 1928)~~ 72 L. Ed. 544;

Sultan R. & T. Co. v. *Dept. of L. & I.*, U. S. Adv. Op. of June 1, 1928, p. 559; 72 L. Ed.—.

In *King Mfg. Co.* v. *Augusta* (U. S. Adv. Op. of June 1, 1928, p. 544; 72 L. ed., this court considered a case in which it was alleged that an ordinance of the City of Augusta, Georgia, violated the Constitution of the United States, by impairing the obligation of a contract between the

appellant therein and the city. This court held that the finding of the state courts on the question of whether there was an agreement was entitled to respect (p. 549),

> "But is not conclusive; for it rests with this court in cases like this, where contract obligations are said to have been impaired by subsequent legislation contrary to the constitutional restriction, to determine whether there was a contract and what obligations arose from it." (Citing cases.)

Even though in that case there was no formal agreement and such agreement as was claimed to exist arose from conversations and correspondence between representatives of the parties.

For these reasons it is respectfully submitted that a complete and binding contract existed between the State of New Jersey, acting by and through its State Highway Commission, and appellant, under which it was agreed that appellant would eliminate the grade crossing of State Highway Route No. 16 over its railroad according to a definite plan, and that the cost thereof would be apportioned and paid $40,000 by appellant and the balance by the State, and that the order of the Board violates the said provision of the Constitution of the United States.

III.

The Order of the Board, and the statutes under which it was made as construed by the Courts of New Jersey, violate the due process and equal protection clauses of the Constitution (Art. XIV, Sec. I), in that they

(a) *Constitute an unreasonable exercise of the police power by requiring an unreasonable expenditure for the elimination of said crossing, and thereby deprive the appellant of its property without due process of law;*

(b) *Confiscate the property of the appellant for the benefit of others, and*

(c) *Deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.*

The bill of complaint alleges that the order was an unreasonable exercise of the police power and thereby deprived the appellant of its property without due process of law in violation of the Fourteenth Amendment, and confiscates the property of appellant for the benefit of other persons and takes its property for public use without just compensation. (R. 27), and the testimony supports the allegation (R. 45, 58).

(a)

The order is an unreasonable exercise of the police power.

The exercise of the Board's power is predicated upon the police power.

The Courts have referred to the police power as "the limitless ether of force not yet occupied by substantive law." It has been called the "despotic" power of the sovereign. It is the application of the personal right or principle of self preservation of the body politic. (*Wynehamer* v. *People*, 13 N. Y. 378.) To its exercise there are no limits except the restrictions contained in the written constitution (*1 Thayer Const. L. 720; Jacobson* v. *Mass.*, 197 U. S. 11, 49 L. Ed. 643; *McLean* v. *Ark.*, 211 U. S. 539; *M. K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 42 L. Ed. 878.

Private corporations are subject to the police power, but such regulations must not conflict with the charter, nor take from a corporation any of its essential rights and privileges (*Cooley Const. Lim.*, 718; *L. & N. R. Co.* v. *Ky.*, 161 U. S. 677) (40 L. Ed. 849).

The Courts have never defined the limits of the police power because the quantum of force necessary for self defense is incapable of ascertainment in advance of the emergency. However, it is always a question for judicial determination whether in a given instance a person or a state used unnecessary force.

So long as all persons are impartially affected, the right of the sovereign to exercise the police power to the fullest extent of the reasonable requirements of the public welfare, includes the power to confiscate or destroy, but the police power is not a "night-stick" to be used to compel one person or class of persons to give up more than his or their share, or more than the public welfare reasonably requires, for the sole benefit, and convenience of others. Why should the owners of two public highways of equally legal authority and status be treated so differently? The railroad is strictly regulated in every phase, including income, outgo, and profits, by the Federal Government, and used by the public at large at the lowest rates consistent with an intended fair return. The public highway is unrestricted even in that portion of its traffic which competes with the railroad, is used free of charge by the public indiscriminately. Yet the owners of the securities and the patrons of the railroad must pay all the cost of accommodating the safety and convenience of the travelers on the highway.

That much, however, is settled by the cases, but this case presents a new question, namely, whether the police power is *reasonably* exercised when it requires these security holders and patrons of the railroad to pay more than twice the cost of providing the reasonable requirements of public safety and convenience, in order to provide nothing of safety, but a pure luxury of convenience. Appellant complains, not of the reasonable necessities of the situation, but only of the excessive requirements of the order of the Board.

In *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District* (233 U. S. 75, 58 L. Ed. 857), the railroad company had been ordered to destroy its existing bridge over the Kansas River and erect another at a different elevation. This Court said (p. 79):

> "The decisions also show that a state cannot avoid the operation of this rule *by simply invoking the convenient apologetics of the police power*. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. 'The State can do nothing that will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases.)"

The *Kaw Valley* case was decided long before the Transportation Act was enacted. The point is much more important now, since Congress has imposed upon the carriers the duty of "reasonable expenditures" for structures, including grade separations at railroad crossings and their maintenance. What this Court called "the convenient apologetics of the police power" certainly applies when the Board, to suit the preference of the people of a rural community, casts economic principles aside and attempts, as an exercise of that power, to require an interstate carrier to spend from $120,000 to $175,000 more than the public necessity and convenience of the situation reasonably require, or that any reasonably intelligent person, charged with any financial responsibility in the matter, could, in conscience, justify.

Mr. Hand, the Chief Engineer of the appellant; Mr. Vanneman, the Chief Engineer of the New York Public Service Commission (who has jurisdiction over and responsibility for all grade crossing eliminations in New York State where the public pays half the cost), and Mr. Diehl (who has many responsibilities of the same nature), all say the Board's order is a sheer waste of money, to

the extent of the difference in cost between the Board's plan and Plan "C" (amounting to from $120,000 to $175,000). In New Jersey, which is the only state in the United States where the law requires the railroad to pay all the cost of carrying out the Board's orders for elimination of crossings, the Board, having no consequent financial responsibility or incentive to economy, acceded to the importunities of a handful of residents of a rural community and made an order that would mulct the appellant of enough money to eliminate another crossing of equal importance. Where, as here, the Board is subject to none of the natural restraints of economic necessity or financial responsibility, the public interest (speaking in the broad sense of the Transportation Act) requires and the courts should apply the rule, even more strictly than elsewhere, to *compel* the observance of the principles of economy and sound judgment laid down in the Transportation Act.

As the New Jersey Court of Chancery said in the *Curtiss & Hill Co.* case *(supra)* "The work which it (the State Highway Commission) is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, not merely in or for the benefit of any particular locality or the citizens thereof."

We contend that the railroad plan (Plan "C") adequately meets all the local requirements and, by eliminating the crossing in accordance therewith, the obligation of appellant would be performed to the full extent of public safety and convenience.

Analogous Cases.

The right of the state to order the elimination of a grade crossing at the expense, either in whole or in part, of the appellant depends upon the police power; and if it appears in any case that that power has been unreasonably or arbitrarily exercised, the order is invalid even though the statute upon which the order may have been based may itself be valid.

We have shown that the present order is far in excess of what the reasonable necessities of the situation require, and that the cost of conforming therewith is greater both for construction and maintenance of the under-pass, and the railroad bridge thereby required, than is necessary in order to meet the requirements of public safety and convenience.

In these respects the case is analogous to the numerous decisions which have restrained the action of the state or of an administrative board which has undertaken to fix or limit rates of public utilities in such a way as to prevent a fair return upon the value of the property. The principle upon which those cases depend applies to the present case; in the rate cases the courts have prevented the "taking" of the property of a utility for the use of the public without fair compensation; in the present case what the appellant seeks is to prevent the state, through the Board of Public Utility Commissioners, from taking such part of its property as exceeds the reasonable cost of eliminating this crossing for the use of the public by an unreasonable exercise of the police power.

There are several recent cases in which the principle has been applied to rate cases, to wit:

> *Public Service Railway Co.* v. *Board of Public Utility Commissioners*, 276 Fed. 979, application for preliminary injunction—appeal dismissed per stipulation 266 U. S. 636, 69 L. ed. 481.

New York Telephone Co. v. *Board,* 5 Fed. (2nd) 245 (May 2, 1925)—application for temporary injunction—affirmed 271 U. S. 23, 70 L. ed. 808.

Middlesex Water Co. v. *Board,* 10 Fed. (2nd) 519 (decided Jan. 7, 1926), on final hearing.

As held in these and numerous other like cases, the Fourteenth Amendment safeguards just compensation to the utility, and by that is meant "a reasonable return on the value of the property used at the time that it is being used for the public service" (*Telephone* case, *supra*).

If an order of an administrative utility board is of such a nature as to prevent a reasonable return and thereby deprive the utility of just compensation, it is held to be a violation of the Fourteenth Amendment; and on the same reasoning, if the property of a utility is taken from it to an unreasonable and excessive extent by the exercise of the power of the Board to order the elimination of a grade crossing, such action is equally a violation of the Fourteenth Amendment.

Granting as an abstract question the power of the state to eliminate a grade crossing, the question still remains in any particular case whether such power has had been exercised in a reasonable manner. In *Colorado* v. *U. S.,* (271 U. S. 153; 70 L. ed. 878) this court held that the power of a state to regulate intrastate traffic or to order a particular service, is subject to the limitation that the order must not be unreasonable.

Granting, for the purpose of argument, that a statute may be sustained as a reasonable exercise of the police power, an *order* made thereunder may nevertheless be invalid under the circumstances of the particular case. The principle is thus stated in the case of *Dobbins* v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169, in which this court said:

> "It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances,

> and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinances is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

This principle is so well settled that it seems unnecessary to quote from other cases on the same subject, but the following decisions are cited:

> *Lawton* v. *Steele*, 152 U. S. 133, 38 L. Ed. 385;
> *Holden* v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780;
> *Conway* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679;
> *Otis Elevator Co.* v. *City of Chicago*, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192, 198.

In *Nectow* v. *City of Cambridge* (U. S. Adv. Op. of June, 1, 1928, p. 520; 72 L. ed.—), this court reviewed a judgment of the Supreme Court of the State of Massachusetts involving the validity of a zoning ordinance of the City of Cambridge. The question of fact in the case was whether the districting of the plaintiff's land in a residence district would promote the health, safety and convenience and general welfare of the inhabitants of that part of the city. It appeared in that case that before the passage of the ordinance the plaintiff in error had outstanding a contract for the sale of part of this land, but, because of the zoning restrictions contained in the ordinance, the purchaser refused to comply with the contract.

The opinion of this court delivered by Justice Sutherland is in part as follows:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restric-

tion cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Euclid *v.* Ambler Realty Co., *supra*, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the *locus* in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained."

The case of *Chicago etc. Ry. Co.* v. *City of Minneapolis*, 238 Fed. 384, is directly in point. There a railroad company obtained an injunction to restrain the enforcement of a municipal ordinance which required the company to change the elevation of its tracks. The injunction was allowed on the ground that the cost of the change, as required by the ordinance, was substantially in excess of the cost of the change as proposed in the railroad plan. We quote from the decision:

> "The police power of the state, whether exercised through the Legislature or municipalities, is very broad. It may be exercised for the safety, health, morals, convenience, or the general prosperity of the public; but it is not without limitation. When the police power exercised by a municipality is by means of an ordinance, such ordinance must have some relation to one or more of the objects above mentioned. The ordinance must not conflict with state or federal Constitution, nor with state or federal statutes. It must not arbitrarily, unnecessarily or unreasonably invade private rights or property (citing cases).

> In the present case, upon a careful consideration of the whole of the evidence, I have reached the conclusion that the ordinance in question is unreasonable, arbitrary, and void, and that the enforcement thereof would deprive the plaintiff and the interveners of their property without due process of law: First, because its provisions are in conflict with the statute of the State of Minnesota; second, because it includes within its scope the Lake street crossing, and such inclusion, as shown by the evidence of both the plaintiff and the defendant, is unnecessary, unreasonable, and arbitrary.
>
> Third, because the ordinance, while providing for a separation of railway and street grades, unnecessarily and unreasonably imperils the safety of the railway employes, and imposes unnecessary and unreasonable expense upon the plaintiff railway company, and the intervening railway company and industries, to the extent of several million dollars, amounting to a practical confiscation of their property."

That case is in point for the following reasons:

1. Like our case, it involves an order for the elimination of grade crossings.

2. It condemns a plan that unnecessarily and unreasonably imperilled the safety of railway employees. The Board's plan in our case provided for the projection of side and inter-track girders above the top of the rails, which are dangerous to passengers boarding and leaving trains at the station located at that point (R. 183), and they are likewise dangerous to employees who are required to walk between the tracks or get on or off of freight trains at that point. Appellant's Grade Crossing Engineer (R. 183) and Mr. Vanneman both objected to this feature of the Board's plan (R. 201).

3. It condemns the imposition of unnecessary and unreasonable expense upon the railway company.

4. It condemns the inclusion of a crossing which was shown by the evidence to be unnecessary to the main project.

The Board's order in this case calls for the closing of the crossing of Camp Lane located 1,400 feet from the crossing for the elimination of which the proceeding was instituted, and the acquisition of land for and the construction thereon of a connecting highway for a distance of 1,940 feet between Camp Lane and Route No. 16. No proceeding for the closing of that crossing was instituted. The Board's Chief Engineer refers to it as "a comparatively unimportant route" (R. 178). Its inclusion in the Board's plan involves an extra cost of $10,450, besides the cost of the land for 1,940 feet of connecting road (R. 188). The traffic record on that highway offered by the Board's Chief Engineer (Exhibit "C. 5," R. (between) 170-171), shows no justification for the expenditure of any money for its elimination. No witness said it was dangerous or impeded public traffic (R. 46). It was not even claimed or proven to be a public highway. It is located 1,400 feet away from the principal crossing involved (R. 45, 90), and since the Board's plan calls for raising the railroad tracks only six inches (R. 188), it cannot be physically affected by, and is not incidental to or necessary for, the elimination of the crossing on Route No. 16 (R. 46).

The undercrossing required by the Board's order exceeds the Legal Width of the Highway.

The duty of the Railroad Company, under Section 26 of the Railroad Law (Revision 1903, N. J. P. L., 1903, p. 645), is—

> "to construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road, street or avenue now or hereafter laid, shall cross the same, so that public travel on the said

> road shall not be impeded thereby, *and said bridges and passages shall be of such width and character as shall be suitable to the locality in which the same are situated;* • • •"

This statute does not mean that the crossing must cover the full legal width of the highway or even the full traveled portion thereof.

> *State* v. *Lackawanna R. R. Co.*, 84 N. J. L. 289, 296.

Section 6 of the Act to Establish the State Highway System provides:

> "In all cases the width of the pavement shall be at least eighteen feet and the total width of the roadway shall be at least thirty feet, except at bridges, culverts, *or grade crossings*, where the width of the roadway shall be of such width or widths as the State Highway Commission may deem necessary and determine" (2 Cum. Supp. 3079).

By its resolution of March 11, 1924 (R. 136), the State Highway Commission fixed and determined the width or widths of these under-passages at 18 feet on each side of a center pier and the character thereof as described and provided in Plan "C." That action has never been changed and the determination of this width and character of passages was within the exclusive province of the State Highway Commission. The Board of Public Utility Commissioners had no jurisdiction to order an under-pass of a different width or character from that fixed and determined by the State Highway Commission. Without some such express determination by the Highway Commission, appellant was not required by law to provide an opening greater than 30 feet. The power of the Board to change the width of a highway in a grade crossing order does not, in any case, give the Board unlimited authority to increase the width of highways. That power is limited by, and appellant has the reciprocal right to the benefit of, the minimum legal requirement unless and until another

width is fixed and determined by competent authority. The order of the Board requiring an undercrossing 66 feet wide is arbitrary and unreasonable in the absence of any proof of conditions requiring an undercrossing in excess of 36 feet wide, as determined by the State Highway Commission.

Camp Lane Crossing.

The Fielder Act prescribes certain jurisdictional requirements to justify an order of the Board, namely, if

> "it shall appear to the board that such crossing is dangerous to public safety, or that public travel on such highway is impeded thereby."

The order of November 24, 1926, instituting the proceeding for the elimination of the crossing on Route No. 16, did not purport to institute a proceeding for the elimination of Camp Lane crossing. Indirect reference was made to it in the following language:

> "It appears that any order issued by the Board in this proceeding for the separation of the grades of said highway (Route 16) and of said railroad *may affect* a road known as Camp Lane in said Township of Hillsboro, which is or may be claimed to be a public highway" (R. 119).

Far from this being the kind of a proceeding instituted by the Board authorized by Section 5 of the Act, this is only a suggestion, first, that this crossing *might* be *affected*, and second, that it *is or may be claimed to be* a public highway. There is no statement or even intimation of any intention to separate the grades at this crossing, or that it is a public highway.

As a matter of fact, Camp Lane will not be *affected* by the separation of grades on Route 16, according to the plan adopted by the Board, since the railroad tracks are to be raised only six inches at Route No. 16 crossing which will not change any physical condition at Camp Lane, which is 1,400 feet away (R. 45, 46, 90). It is there-

fore obvious that what the Board ordered for Camp Lane was in no way connected with or incidental to the separation of grades on Route 16.

Moreover, it does not appear anywhere that Camp Lane is a public highway. The question about its status raised by the Board at the beginning was never answered.

It is claimed, on behalf of the Board, that counsel for the appellant, at the hearings before the Board, admitted that Camp Lane was a dangerous crossing and that the Board accepted this admission as a basis of its order.

In the first place, when the jurisdiction of the Board is required by the Act to depend upon a judicial finding of fact, "that such crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby," an admission of counsel (if made) could not be accepted, in lieu of proof, to confer jurisdiction. Consent of counsel cannot confer jurisdiction on a legislative tribunal. In the second place, no such admission was made. Counsel did agree not to offer any objection to the claim (R. 181, 182) that the crossing on Route 16 was dangerous, but in that instance the word "crossing" was used in the singular number and referred only to the crossing on Route 16.

The estimate of the Board's Chief Engineer for the changes ordered in Camp Lane was $10,450 (R. 188) and did not include anything for the cost of land for the 1,940 foot connecting road.

The traffic record of this crossing for Friday, June 3rd, Saturday, June 4th, and Sunday, June 5th (representing weekday, holiday and Sunday traffic in what is the most favorable season of the year for highway traffic), shows that on June 3rd, between 7 A. M. and 8 P. M., this crossing was used by sixty-eight automobiles and forty trucks (a total of 108 motor vehicles) and thirty-eight

pedestrians. Only nine wagons crossed on that day. On June 4th, between the same hours, there were sixty-eight automobiles and thirty-seven trucks (a total of 105 motor vehicles), sixteen pedestrians and three wagons. On June 5th, between the same hours, there were seventy automobiles, thirteen trucks (a total of eighty-three motor vehicles), fifty-three pedestrians and five wagons. There were a few bicycles and motorcycles each day (Exhibit C. 5, R. 170-171). By counting every class of movement, including pedestrians, there were 167 on June 3rd, 140 on June 4th and 156 on June 5th. This fairly illustrates the unimportance of this crossing and yet the Board's order would require an expenditure of $10,450 plus the cost of the necessary land for the connecting road to close the crossing and build the connecting roadway between Camp Lane and Highway Route No. 16.

In *Potter* v. *Public Utility Commissioners* (89 N. J. L. 157) the Court held that there was nothing in the Fielder Grade Crossing Act "which gives the Board jurisdiction to order private property taken *when* (as in this case) *such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition and order.*"

Certainly the elimination of Camp Lane crossing was not "fairly incidental or necessary for the elimination of the danger or impediment at the crossing" on State Highway Route No. 16, *since Camp Lane crossing is 1,400 feet from the Highway Route No. 16, and, inasmuch as no change in the track levels were contemplated or ordered which could create any possible relation, legal, physical or otherwise, between the two crossings.*

The order of the Board respecting Camp Lane was, therefore, purely arbitrary and unreasonable.

(b)

The Order Confiscates Appellant's Property for the Benefit of Others.

The evidence shows that the Board's order and plan required the appellant to make an expenditure, for the sole benefit of property owners and residents of the community in which the crossing is located, of $120,000 or more, in excess of the reasonable requirements of the situation and in excess of what is reasonably required to remove the conditions of danger to or impediments of highway traffic claimed to exist at the present grade crossing of Route No. 16. Also that the Board's order requires the appellant to bear the entire cost of the proposed improvement estimated at $324,400 when, otherwise, under its agreement with the State Highway Commission, it was required to bear only the definite sum of $40,000 of that cost. Also that the Board's order required the appellant to provide a strip of its land (R. 45) 33 feet wide and 240 feet long (R. 211) without compensation for the widening of Highway Route No. 16 across appellant's right of way and property at the crossing, and require it to construct an under-crossing 66 feet wide with provision for two 20-foot roadways and two 8-foot-6-inch sidewalks, on a highway whose legal width is 33 feet, and upon which there is a traveled roadway only 20 feet wide with an improved permanent pavement 18 feet wide; also that said order requires appellant to make an expenditure of $10,450 plus the cost of acquiring land for a 1,940-foot connecting road for the closing of Camp Lane crossing without any proceedings having been instituted for that purpose and without any evidence to show that Camp Lane is a public highway or that said crossing created any danger to or impediment of highway travel.

This taking of the appellant's property is for the sole benefit of property owners and residents in the vicinity of the crossing.

(c)

The Order of the Board and the Statutes under which it was made, as construed by the Courts of New Jersey, deprive the appellant of a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue of confiscation.

In the petition for rehearing filed in the court below, appellant urged that the denial of the New Jersey Supreme Court of a review of said order of the Board, and the statutes under which the order was made, deprived the appellant of its property without due process of law, in that thereby the appellant was refused, and deprived of, the right to a fair opportunity to submit to a judicial tribunal, for determination upon the independent judgment of such tribunal as to both the law and the facts, the issue whether said order confiscates the appellant's property (R. 104-108).

The only review of an order of the Board given by the statute or available to an aggrieved party, is that described in Sections 38 and 39 of the Public Utilities Act, reading as follows:

> "38. Any order hereafter made by the board may be reviewed upon certiorari by the Supreme Court. No certiorari to review any such order shall be allowed unless application therefor be made within thirty days from the date upon which such order becomes effective, nor unless notice in writing of such application shall have been given to said board, with a copy of the affidavits or proofs upon which such application is based; notice of such application shall be served upon the secretary of said board, either personally or by leaving the same

at the office of said board in the City of Trenton. The Supreme Court is hereby given jurisdiction to review said order of the board and to set aside such order in whole or in part when it clearly appears that there was no evidence before the board to support reasonably the same or that the same was without the jurisdiction of the board. The evidence presented to the board, together with the findings, and the order issued thereon, shall be certified by the board to the Supreme Court as its return. No such order shall be set aside in whole or in part for any irregularity or informality in the proceedings of said board unless such irregularity or informality tends to defeat or impair the substantial right or interest of the prosecutor in certiorari. If, with respect to any order brought under review by certiorari, it shall appear equitable and just that a rehearing should be had before said board, the Supreme Court may order that such rehearing be had upon such terms and conditions as are reasonable, and the said board shall thereupon proceed to rehearing on the testimony theretofore taken before it, and upon which the order under review was based, and upon such additional testimony, if any, as may be produced. As the result of such rehearing the board may readopt such order, or alter, amend, modify or extend the order theretofore made by it.

Whenever a judgment of the Supreme Court upon certiorari to review an order made by said board shall be appealed to the Court of Errors and Appeals, and said Court of Errors and Appeals shall deem it equitable and just that a rehearing should be had before said board, the said court shall remit the record and proceedings before it to the Supreme Court, to the end that said court may order that such rehearing may be had before said board upon such terms and conditions as are reasonable, as hereinbefore provided" (N. J. P. L. 1911, p. 388; as amended N. J. P. L. 1918, p. 305; 2 Cum. Supp. p. 2896).

"39. The allowance of a writ of certiorari or in the institution of any proceeding to review any

order of the board by the Supreme Court as aforesaid, shall in no case supersede or stay the order of the board, unless the Supreme Court, or a justice thereof, shall so direct, and the appellant may be required by the Supreme Court, or a justice thereof, to give bond in such form and of such amount as the Supreme Court, or the justice thereof allowing the stay, shall require" (N. J. P. L. 1911, p. 388; 2 Cum. Supp. 2897).

Writ of certiorari is the proper, and only, remedy to review an order of the Board.

Acquackanonk Water Co. v. *Commission*, 97 N. J. L. 366 (Sup. Ct.), affirmed by the New Jersey Court of Errors and Appeals; 125 Atl. Rep. 33.

Although, (as the Supreme Court observed in that decision) the setting aside of an order may not afford the prosecutor complete relief.

The New Jersey Supreme Court has construed Section 38 as limiting its power to set aside an order of the Board made within its jurisdiction to cases where there is *no evidence* to support reasonably the order.

Middlesex Water Co. v. *Board*, 140 Atl. Rep. 254;
Middlesex Water Co. v. *Board*, 140 Atl. Rep. 256;
Eastern N. J. Power Co. v. *Board*, 140 Atl. Rep. 258, 259;
Elizabethtown, &c. Co. v. *Board*, 95 N. J. L. 18.

The New Jersey Court of Errors and Appeals has construed these sections of the statute as conferring upon the Supreme Court merely the power to set aside an order and not to compel the Board to revise its order or make a new one.

Public Service Co. v. *Board*, 87 N. J. L. 581 (affirming the Supreme Court, 84 N. J. L. 463);
Erie v. *Board*, 90 N. J. L. 271.

The allowance or refusal of a writ of certiorari is discretionary with the State Supreme Court and is, therefore, not subject to a review.

Cavanagh v. *Bayonne*, 63 N. J. L. 176, 179;
Woglom v. *Perth Amboy*, 80 N. J. L. 469, 470.

In the present case the appellant applied to a justice of the Supreme Court for a writ of certiorari to review this order, as the only means of review provided by the statute. Exercising his discretion, he denied the writ (R. 98; 137 Atl. Rep. 443), without prejudice, however, to an application to the Supreme Court *in banc*. The appellant then applied to the Supreme Court (*in banc*) and that application was denied in the exercise of the discretion of the Court (R. 102; 137 Atl. Rep. 923). The applications for writ of certiorari were timely made. The Board's order was made April 26, 1927, and served a few days thereafter. The first application for review was made May 14, 1927, and denied May 17, 1927. The second application was made on May 23, 1927, and denied on May 31, 1927. The appellant had then exhausted its remedies in the State courts and had been denied any review of the order. On June 1, 1927, appellant filed its bill of complaint in the court below.

Our contention is that the act not only fails to provide but, as construed by the courts of New Jersey, expressly denies a means of review of an order of the Board *as of right*, and not only fails to provide, but expressly denies the party aggrieved by such an order, the right or privilege to submit the issue of confiscation (as raised in this case) to a judicial tribunal for determination upon the independent judgment of such tribunal, as to both the law and the facts involved in the case.

That the function of the Board under the Fielder Act is legislative, and not judicial, is settled by the decision of the New Jersey Supreme Court in *Erie R. R. Co.* v.

Board (89 N. J. L. 57); affirmed by the Court of Errors and Appeals, on the opinion below (90 N. J. L. 672). One of the questions raised and argued before the Court in that case was that the Fielder Act violated the New Jersey constitution by conferring upon the Board judicial powers belonging exclusively to the Court of Chancery. The New Jersey Supreme Court (p. 91) rejected this contention and held that all the questions claimed to be of a judicial nature—

> "• • • are determined by the statute, leaving nothing of a judicial nature to be adjudicated by statutory tribunal excepting the applicability of such legislative scheme to a given state of facts if it be found to exist, and the determination thereupon of the practical methods of accomplishing the legislative object."

To the same effect see *Keller* v. *Potomac Elec. Power Co.*, 261 U. S. 428, 440, 441; 67 L. Ed. 731, 735.

The Board is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment of the legislature.

> *Bluefield W. W. & I. Co.* v. *Public Service Com.*, 262 U. S. 679, 683; 67 L. Ed. 1176, 1179.

In *Ohio Valley Water Company* v. *Ben Avon Borough*, (253 U. S. 287; 64 L. Ed. 908), the situation was as follows:

The Pennsylvania Public Service Commission determined the value of the property of the Water Company for rate purposes. The Water Company appealed.

The Public Service Company Law (Pa.), (approved July 26, 1913, amended June 3, 1915, Pa. P. L. 779), Article VI, provides as follows:

> 17. "• • •, any party to the proceedings effected thereby may appeal therefrom to the Superior Court; • • • The said court is hereby clothed with exclusive jurisdiction throughout the

> Commonwealth for the purpose of hearing and determining any and all said appeals: * * *."
>
> 18. "* * * Jurisdiction is hereby conferred upon the Superior Court to hear and dispose all such appeals, * * * subject to appeal to the Supreme Court, as hereinafter provided as in all cases of appeals from the findings, determinations and orders of the Public Service Commission."

Up to this point it will be observed that the Pennsylvania Act differs from the Fielder Act in that the former does, and the latter does not, give an appeal *as of right*.

Section 19 of the Pennsylvania Act (like Section 38 of the New Jersey Act), does not give a mandatory supersedeas with an appeal, but makes such supersedeas discretionary with the Court, and provides for a bond.

Section 22 provides:

> "At the hearing of the appeal the said court shall, upon the records certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

Section 24 provides:

> "If the court shall, upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, upon the record find that the order appealed from is unreasonable or based upon incompetent evidence materially effecting the determination or order of the commission, or is otherwise not in conformity with the law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law."

The order of the Pennsylvania Commission was reversed by the Superior Court which fixed a higher valuation and directed the Commission to revise its order

accordingly. On appeal to the Pennsylvania Supreme Court, that Court reversed the decree of the Superior Court and reinstated the order, on the ground that there was competent evidence tending to sustain the Commission's conclusions, and no abuse of discretion appearing, the Superior Court should not have interfered therewith, and said:

> "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the Commission upon the question of values, there was merely the substitution of the former's judgment for that of the Commission, in determining that the order of the latter was unreasonable" (260 Pa. 289).

The judgment of the Pennsylvania Supreme Court was brought to this court on writ of error. After reciting the history of the proceeding, this Court said (pp. 288, 289):

> "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.
>
> "The order here involved prescribed a complete schedule of maximum future rates *and was legislative in character* (citing cases). In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment.

Missouri P. R. Co. v. J. W. Tucker, 230 U. S. 340, 347, 57 L. Ed. 1507, 1509, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 660, 661; 59 L. Ed. 405, 411; *P. U. R.* 1915 A, 106, 35 Sup. Ct. Rep. 214; *Missouri v. Chicago B. & Q.*

R. Co., 241 U. S. 533, 538, 60 L. Ed. 1148, 1154, 36 Sup. Ct. Rep. 715; *Oklahoma Operating Co.* v. *Love*, (March 22, 1920) (*March 22, 1920*) 252 U. S. 331, ante, 596, 40 Sup. Ct. Rep. 338, 64 L. Ed. 596.

Here the insistence is that the Public Service Company Law, as construed and applied by the supreme court, has deprived plaintiff-in-error of the right to be so heard; *and this is true if the appeal therein specifically provided is the only clearly authorized proceedings where the Commission's order may be challenged because confiscatory. Thus far plaintiff-in-error has not succeeded in obtaining the review for which the 14th Amendment requires the state to provide.*"

In a dissenting opinion, concurred in by Mr. Justice Holmes and Mr. Justice Clarke, Mr. Justice Brandies said:

"Whether the appeal to the Superior Court fails for the reason assigned, or for some other reason, to satisfy the constitutional requirements of a judicial review we need not determine; because the statute left open to the company, besides this limited review, the right to resort to the state courts, as well as in the federal court, to another and unrestricted remedy; the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement."

In the cases above cited, the New Jersey Court of last resort has held that under the New Jersey Statute there is no other remedy restricted or unrestricted. The *only* remedy prescribed or permitted thereby is by writ of certiorari and that is discretionary. And the exercise or refusal to exercise that discretion is not reviewable. Appellant applied twice for such a writ and it was twice denied. Of course the statute could not deny to appellant the right to challenge the validity of the order in a suit in equity in the Federal Court, but it was not safe to resort to that remedy until it had exhausted every reason-

able means of obtaining a proper review in the state courts.

Prentice v. *Atlantic Coast Line*, 211 U. S. 209; 53 L. Ed. 150.

The result is that the language of Sections 38 and 39 of the Utilities Act and the limitations upon review therein contained, as construed by the state courts, place the appellant herein in a less favorable position with respect to the question of due process of law than that in which this court found the Ohio Valley Water Company to be. Our case is stronger in the following particulars:

(a) The Pennsylvania statute gave an appeal *as of right*: The New Jersey statute permits a review only by means of a discretionary writ with no review of the refusal to exercise that discretion.

(b) The Water Company had its review before two Pennsylvania courts; our application for review was twice denied.

(c) The Pennsylvania statute authorizes the Superior Court to determine whether or not the order appealed from is *reasonable and in conformity with law*: the New Jersey Act gives the state court the right to set an order aside only when it *clearly appears* that there was *no evidence* before the Board to support reasonably the same or when it *clearly appears* that the order was without the jurisdiction of the Board.

(d) This Court found a denial of due process, not because the Pennsylvania statute by its terms withheld from the Court the power to determine the question of confiscation according to their own independent judgment, but because that was the effect of the decision of the Supreme Court of Pennsylvania in construing the statute. Under the New Jersey act the Court is expressly denied the right to determine any question on its own independent

judgment. It cannot set an order aside if there is *any* evidence reasonably to support it. In this case the Supreme Court twice refused to give appellant an opportunity to bring the record before it for consideration of the question of fact or law on the issue of confiscation.

Subsequent cases involving this question, with respect to orders of State Boards or Commissions in which this Court has cited and followed the decision in the *Ohio Valley Water Company* case are as follows:

Keller v. *Potomac Electric Power Co.*, 261 U. S. 428; 67 L. Ed. 731;

Bluefield Water Works & Improvement Co. v. *Public Service Commission*, 262 U. S. 679; 67 L. Ed. 1176;

Ohio Utilities Co. v. *Public Utilities Commission*, 267 U. S. 359; 69 L. Ed. 656;

Northern Pacific Ry. v. *Department of Public Works*, 268 U. S. 39; 69 L. Ed. 836.

In cases involving the authority of the state to order the elimination of grade crossings, reliance has often been placed upon the case of *N. Y. & N. E. R. R. Co.* v. *Bristol*, (151 U. S. 556; 38 L. Ed. 269). That case involved a statute of the State of Connecticut and one of the questions raised was whether the appellant was denied due process of law by the provisions of that statute as construed by the state courts. This court sustained the constitutionality of that act and held that there was no denial of due process of law thereunder. That case did not involve any question of the failure of the statute itself to provide for an independent judicial review of the orders of the State Commission.

The Connecticut act involved in that case (General Statutes of Connecticut (Rev. 1920), p. 924, *et seq.*), provided, with respect to review of the orders of the Commission, as follows:

Section 3718 (p. 926) provides:

> "The decisions of the commissioners relating to any matter upon which they may act under the authority of sections 3713, 3714, 3716 and 3717, shall be communicated to the petitioners and to all persons to whom notice of the hearing on said petition was given, within twenty days after the final hearing; and any person aggrieved by such decision, who was a party to said proceeding, *shall have the same right of appeal therefrom* as is given by section 3747 concerning appeals from decisions relating to depots."

Section 3747 (p. 933) provides:

> "Any person aggrieved by any order of the railroad commissioners, upon any proceeding relative to the location, abandonment, or changing of stations to which he was or ought to have been made a party, *may appeal* from such order to the superior court of the county in which the cause of appeal shall arise, within thirty days after the publication of such order, by a petition in writing • • •. Said court *may hear said appeal and re-examine the question of the propriety and expediency of the order appealed from* • • •, *and shall proceed thereon in the same manner as upon complaints for equitable relief;* and in case said order is not affirmed, *may make any other order in the premises that it may deem proper* and which might have been made by the railroad commissioners, and may award costs at its discretion. *Such appeal shall be a supersedeas of the order appealed from until the final action of the court thereon,* • • •."

It will be noted that the Connecticut statute provides an appeal *as of right*, with equity jurisdiction and the power to revise or reform the order, with a mandatory supersedeas pending review. This is different from our Section 38 of the New Jersey Utilities Act, which limits review to the discretionary writ of certiorari, and from our Section 39 which provides only for a discretionary stay. This Court considered the question whether the

Connecticut Act violated the due process clause, and held that thereunder;

> (a) There could be no objection that a hearing was not required or accorded "in view of the protracted proceedings before the commissioners *and the Superior Court and the review in the Supreme Court.*"
>
> (b) "The *right of appeal* saved the railroad companies from any harm from their findings" (involving a review of facts as well as law).
>
> (c) "Nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained *in a mode suited to the nature of the case*, and not merely arbitrary and capricious."

While some of the decisions above cited happen to involve rate statutes or rate orders, there is no reason for distinguishing between statutes or orders relating to rates and those involving other subjects of regulation of public utilities where the denial of constitutional guaranties is claimed.

Statutes and orders of both classes arise from the same authority and have the same general purpose of regulating public utilities in the interest of public necessity, convenience, safety and general welfare. In New Jersey all regulatory orders whether they relate to rates, service or the elimination of grade crossings, arise from the authority of the same statute. If the statute is unconstitutional for the purpose of one class it must be also unconstitutional for the purpose of the other class, since the procedure is the same for both classes of orders.

The same constitutional questions arise under both classes.

Here it is claimed that the order of the Board is unreasonable and confiscatory because it requires an expenditure of a sum of money twice as large as the law or

public necessity, convenience, safety or general welfare requires. These are questions of fact. If the appellant is to be denied *any* review of the judgment of the Board on these questions (as it has been by the repeated refusal of the New Jersey Supreme Court to allow a writ of certiorari, which is the only means of review available under the law) certainly the appellant is utterly defenseless, except by appeal to the Federal Courts, and it becomes the victim of what Dean Pound calls a system of "justice without law."

If the due process clause of the Constitution of the United States guarantees to appellant the right to an independent judicial determination of these questions of fact and law by an impartial tribunal (as this court held in the *Ohio Valley Water Company* and other cases elsewhere cited herein), that right must hold regardless of the subject matter of the order.

The instant case is a striking illustration of the imperative need of providing and preserving a review *as of right* of orders of regulative state agencies.

The statutes of New York, Connecticut, Pennsylvania and some other states have preserved a *right* of appeal but the statute of New Jersey is an example of the extremely restrictive type, where there is no review *as of right*, but only a discretionary review by certiorari limiting the power of the Court to set aside an order only where it *clearly appears* that there is *no evidence* to support reasonably the order or that the order is without the jurisdiction of the Board.

Under New Jersey practice a writ of certiorari to review the decisions of other administrative bodies operates as a supersedeas and at once puts an end to further proceedings in the cause or matter removed for review.

McWilliams v. *King, et al.*, 32 N. J. L. 21;
McQuade v. *Emmons*, 38 N. J. L. 397;
Hunt v. *Lambertville*, 46 N. J. L. 59;
Helfer v. *Simon*, 53 N. J. L. 550, 553;
Barrett v. *Atlantic City*, 85 N. J. L. 134, 137;
West Jersey Traction Co. v. *Camden*, 58 N. J. L. 536, 539;
Bloomfield v. *Glen Ridge*, 55 N. J. E. 505, 510.

But Section 39 of the New Jersey Public Utility Act makes an express exception to this general rule and provides that even if the Supreme Court should exercise its discretion to review an order on certiorari, the issuance of such a writ does not act as a supersedeas or stay the execution of the order of the Board unless the Supreme Court, in another exercise of its discretion, shall so direct, and then only upon the filing of a bond in such form and amount as the Court may direct.

In the present case, the Board instituted its own proceedings before itself, without any showing of facts or conditions involving the public safety, convenience, or welfare. By its own direction, and before any hearing was held, to consider the need of eliminating the crossing, its own employees prepared a definite plan. All the testimony on the jurisdictional question of danger to or impediment of public travel was presented by the Board itself through its employees. All the Board's witnesses were examined by the member of the Board who conducted the hearings.

The only answer to the bill of complaint filed in this suit was that of the Board itself and the only appearance of any of the several defendants in the court below was that of the Board's own attorneys, who presented the only argument in support of the Board's order.

This procedure emphasizes the necessity for a review of the order by an independent judicial tribunal on questions of fact as well as of law.

The Public Utilities Act (N. J. P. L. 1911, p. 387, provides as follows):

> "33. In default of compliance with any order of the board when the same shall become effective, except orders to resume service which has been discontinud the person or public utility affected thereby shall be subject to a penalty of one hundred dollars per day for every day during which such default continues; in default of compliance by a public utility as herein defined with any order of the board when the same shall become effective, directing such public utility to resume service which has been discontinued, the person or public utility affected thereby shall be subject to a penalty of two hundred and fifty dollars per day for every day during which such default continues, such penalties to be recovered in an action of debt in the name of the State, and observance of the orders of the board may be enforced by mandamus or injunction in appropriate cases, or by suit in equity to compel the specific performance of the order or orders so made, or of the duties imposed by law upon such public utility" (2 Cum. Supp. 2895).
>
> "35. Any person who shall knowingly and willfully neglect, fail or omit to do or perform, or who shall knowingly and wilfully cause or join or participate with others in causing any public utility corporation or company to neglect, fail or omit to do or perform, or who shall advise, solicit or persuade, or knowingly and willfully instruct, direct or order any officer, agent or employee of any public utility corporation or company to neglect, fail or omit to do any act or thing required to be done by this act shall be guilty of a misdemeanor" (2 Cum. Supp. 2896).

Under Section 218 of the Crimes Act of New Jersey (N. J. P. L. 1896, p. 794), a misdemenor is punishable by a fine not exceeding $1,000 or by imprisonment with or without hard labor, as the Court may direct, or any term not exceeding three years, or both (2 Com. Stat. 1812, Sec. 218).

If the Supreme Court, in the exercise of its discretion, refuses a writ of certiorari to a person aggrieved by an order of the Board (as it refused the appellant in this case) he stands defenseless under the laws of New Jersey and is confronted with the necessity of either complying with an order, however burdensome, arbitrary, unreasonable or unlawful it may be, or of submitting to the penalties and prosecutions specified in Section 33 and if the order is against a corporation any officer, agent or employee or any other person connected with it who neglects, fails or omits or instructs, directs or orders such neglect, failure or omission, thereby becomes guilty of a misdemeanor punishable by a fine not exceeding $1,000 or by imprisonment with or without hard labor, as the Court may direct, or any term not exceeding three years, or both.

For non-compliance with this order (except for the supersedeas granted by the Court below), the Board is authorized by the statute to sue for and collect penalties of $100 a day and to compel observance by mandamus or injunction or by specific performance and to initiate criminal proceedings against the officers, agents or employees of the company for the commission of a misdemeanor.

To sum up the power of the Board under the New Jersey law, as illustrated by this case: The Board possesses the composite power of a complainant to institute a proceeding; to present witnesses to prove the facts without regard to rules of procedure or of evidence; to act as attorney to try the case, as judge to conduct the trial, as jury to determine the questions of fact, as the Court to render and enter judgment, as the sheriff to execute the judgment and as the prosecuting attorney to punish the refusal or failure to comply with the judgment; and provides its counsel to oppose an application for review and to defend its own judgment when its validity is questioned in the courts.

In such a case, the commission often becomes what has been called "that judicial monster, a judge in his own cause."

For these reasons it is respectfully submitted that the order of the Board, and the statutes under which it was made, violate the due process and equal protection clauses of the Constitution.

IV.

Discussion of the Opinions Below.

The Opinion of the Board.

The plan adopted by the Board was prepared by its own engineer at its direction, and was presented and recommended by him. His is the only testimony offered to support it. He stated that he made no study or plan for elimination by relocation of the highway (R. 180), although the order instituting the proceeding announced that the relocation of the highway was one of the methods of elimination to be considered (R. 118); and he offered no testimony in opposition to any feature of the appellant's plan "C."

The Board's opinion says (referring to Route No. 16):

> "All parties consent to the elimination of the grade crossing" (R. 122).

The appellant did not consent to the elimination of that crossing by means of the Board's plan. On the testimony of its own employees, as to Route No. 16 and without any testimony either showing that Camp Lane road was a public highway or was dangerous to or impeded public traffic, the Board found:

> "That both of these crossings are dangerous to public safety and that the public travel thereon is impeded by their existence as grade crossings" (R. 123).

In its decision the Board admitted that the appellant's plan shortened the undercrossing and lessened its cost (R. 124).

Nevertheless that plan was rejected (R. 125), and the Board ordered the appellant, at its own expense, to abolish both grade crossings according to its own plan (R. 115). The decision of the Board is silent as to the legal width of the highway, but states, without any evidence to support it, that the highway is in the process of being widened to a uniform width of 66 feet and straightened by reducing the number of curves and increasing the radii of sharp ones, although it admits the additional property required in the vicinity of the highway has not been acquired. On the strength of this statement it orders the undercrossing to be constructed 66 feet wide (R. 115), thereby taking, by mere fiat, 33 feet of the railroad company's real estate, without providing for any compensation or resorting to the formality of acquiring the same either by negotiations or condemnation as required by the New Jersey Eminent Domain Act (N. J. P. L. 1888, p. 79; 2 Comp. Stat. 2182).

Without any testimony to show the need of sidewalks in this farming community or that there was any development present or prospective in the community and in spite of the undisputed testimony that there are no sidewalks on the highway on either side of the railroad, the Board found:

> "The necessity for sidewalks is now evident and will increase with the developing of the community" (R. 126).

In spite of the undisputed testimony that the present portion of the traveled highway is only 20 feet and has been permanently paved to the width of only 18 feet, and without any testimony to show the need for two 20-foot roadways, the Board announced its opinion:

> "That no bridge should be constructed of less width than the 66 foot right of way, being acquired

> by the State Highway Department • • • that two highways not less than 20 feet wide, measured between curb lines, should be provided" (R. 126).

The only objection offered to the appellant's plan related to the 6-degree curves. The Board's engineer offered no criticism of them. The engineer employed by the County of Somerset said they were perfectly safe and accessible under all conditions.

Contrary to all the evidence and without any evidence to support the conclusion, and notwithstanding the express adoption of these same 6-degree curves by the State Highway Commission which has exclusive jurisdiction of the highway, the Board condemned the 6-degree curves proposed in Plan "C" as in direct opposition to the State's policy, saying:

> "The State has defined its policy concerning the building of the highway in no uncertain terms; Chapter 107, P. L. 1918, among other things, state: 'All sharp turns and angles should be eliminated whenever practicable, and the Highway Department is working to this end. It appears to the Board that the introduction of curves, even though they be no sharper than six degrees, are unnecessary in this instance and are in direct opposition to the State's policy of eliminating curvature on highways wherever practicable, even though maintenance of the highway on tangent would increase the cost of elimination. The Board finds, therefore, against the adoption of the railroad plan' " (R. 125).

This statement ignores the obvious meaning of the words "sharp turns and angles." A 6-degree curve is neither a sharp turn nor an angle. The responsibility for carrying out the State's policy concerning sharp turns and angles rests upon the judgment, not of the Board of Public Utility Commissioners but of State Highway Commission and that that commission did not consider a 6-degree curve a sharp turn or an angle, is shown, without dispute, by its action in proposing Plan "C," in the first instance,

and expressly designing those curves (R. 39); in approving and signing the plan containing them (Exhibit "F," R. 145-150); in preserving 18 curves, each exceeding 6 degrees, in this same highway as permanently improved by the Commission (Exhibit "D," R. 128); and in recording in its minutes that:

> "A six degree curve • • • is not considered serious by the State Highway Commission" (R. 137).
>
> "In addition to that it was pointed out that there are other points on this route where the curvature is 6 degrees or more" (R. 138).

The only other witnesses who referred to the curves were private citizens of the community who objected to the curves because the relocation of the highway might affect their private property. They showed no competency or qualification to testify on the merits or demerits of the curves. The objections thereto were merely opinion testimony based upon no stated facts or qualifications. On the contrary it appears without dispute that the State Highway Commission had officially adopted these curves at the suggestion and recommendation of the State Highway Engineer, and the testimony of well-qualified engineers with many years of training and experience in the precise subject involved, shows overwhelmingly that the proposed 6-degree curves do not introduce any element of danger or inconvenience to highway travel and would be as safe and convenient as if the road were straight; that the elimination of grade crossings on straight highways by the relocation of a section of the highway in order to bring the crossing as near as possible to a right angle, is the standard and uniform practice in New Jersey and New York and elsewhere in the elimination of grade crossings, for the reason that thereby the costs can be greatly reduced without increasing the danger or inconvenience in the use of the highway; that the plan proposed by the appellant was entirely feas-

ible, practicable and safe and was the most economical plan that could be adopted and that the plan approved by the Board was seriously objectionable in that it provided for girders projecting above the level of the rails of the track which would endanger passengers getting on and off trains at the station (R. 183), and also because the placing of girders between the tracks extending above the level of the rails was contrary to standard practice (R. 201) on account of interference with employees getting on and off of trains and walking along the tracks.

In view of this testimony the Board was not justified in construing the language of Chapter 107, P. L. 1918, as requiring a straight highway at this crossing (R. 125).

The Board (R. 125) sought to minimize the difference in the cost of the two plans by saying:

> "The cost of this project (Plan "C," as revised) is estimated to be $205,184.70 including the Camp Lane diversion, which is exclusive of all property and collateral damages except for the property actually needed for the construction of the new highway. • • • Under this plan no detour is necessary during the construction of the new work but when the present grade crossings are vacated the owners of land adjacent to the present highway, between the ends of the proposed diversion, will be left in a cul-de-sac. Damages accruing to such owners must be added to the estimate of the Railroad Company which must materially decrease the difference in cost of the two plans."

The statement contained in the last sentence is contrary to the evidence. The Board made no investigation of such damages. One or two property owners sought to support their opposition to a relocation of the highway by threats of extravagant claims for damages. There was not a word of evidence before the Board either to show that any legal damages would result from the diversion of the highway, or if so, what it would amount to, except that of Mr.

Johnston, Engineer of Grade Crossings of appellant, who testified, concerning his estimate (Exhibit "1," R. 153) of cost under Plan "C":

> "The item of $1,000 contained in the estimate (R. 154) includes the right of way necessary for the relocation of highway Route No. 16, and the cost of deepening the brook to provide drainage for the underpass and damages to property owners" (R. 190).

He also testified:

> "As a matter of fact the estimate of $205,184.70 included what the railroad company's engineers and real estate experts considered an adequate allowance for property to be acquired and damages to other property affected."

This estimate was deemed adequate, since the property consisted entirely of farm low land in a rural community, and no buildings or improvements, other than on railroad property, are affected (R. 53). This testimony was not contradicted.

The Opinion of New Jersey Supreme Court.

The only opinion of that Court was that filed by a justice thereof upon the denial of appellant's first application for a writ of certiorari (reported 137 Atl. 442, R. 98). The second application was denied by that Court *en banc* without opinion (decision reported 137 Atl. 923, R. 102).

The Justice, in his opinion, did not consider the points raised by appellant before him under the Federal Constitution and statutes. He said that he had "no doubt whatever about the jurisdiction of the Board," and that this jurisdiction was not "challenged" at the hearing (R. 100). But the appellant had a right to assume that the Board would not make an unlawful order; it could not anticipate the nature or extent of the order which the Board might make.

The fact that the appellant, in an endeavor to persuade the Board to adopt a plan that could be carried out at a reasonable cost, voluntarily suggested the enlargement of its Plan "C" to provide a 66-foot undercrossing, did not confer upon the Board jurisdiction to order its own plan with a 66-foot undercrossing. Consent of the parties cannot confer jurisdiction upon a statutory tribunal. If such a voluntary suggestion was a consent it applied only to the appellant's plan. There is no evidence to support the Justice's statement that traffic would be choked by two 18-foot roadways (R. 100).

The Highway Commission itself originated and officially adopted that plan and never changed its official action in that respect. The statute requires a pavement of only 18 feet in width and a roadway of a total width of 30 feet, except at certain places, including grade crossings, where the roadway is to be of such width as the State Highway Commission may deem necessary or determine. That Commission had *determined* that the two 18-foot roadways were sufficient at this crossing (R. 136).

The Justice was not justified by any evidence in stating that two sidewalk spaces were necessary or that "the rights of foot passengers on State roads have been too long overlooked, and they are receiving attention none too soon" (R. 100). If this is so, it is not the duty of the appellant to provide sidewalks on State roads. That is a local improvement provided by the public authorities and usually paid for by the owners of abutting property. In any event the supposed need of sidewalks on State roads would not be supplied by providing two 8-foot 6-inch sidewalks for a distance of a hundred feet under this bridge when there are none anywhere else on the highway in the vicinity of the crossing.

There was nothing to justify the Justice's conclusion that it was within the jurisdiction of the Board to include

within its order as an "incidental" matter, the closing of the crossing on "a minor road" called Camp Lane, because "similar action has been taken by that body more than once" (R. 100).

In *Erie R. R. Co.* v. *Board* (89 N. J. L. 57; affirmed by the Court of Errors and Appeals on the opinion of the Supreme Court, 90 N. J. L. 672) the New Jersey Supreme Court sustained an order of the Board for the elimination of fifteen crossings (in one order) under the Fielder Act because it appeared that like conditions prevailed at all of them and that, with the exception of only one, they were all so close together that one could not be eliminated without seriously affecting the others, due to the fact that the plan required a substantial elevation of the railroad.

In *Potter* v. *Public Utility Commissioners* (89 N. J. L. 157) the New Jersey Supreme Court held that there was nothing in the Fielder Act

> "which gives the Board jurisdiction to order private property taken when such property is not fairly incidental nor necessary to the elimination of the danger or impediment at the crossing involved in the petition or order."

There is no such relationship between the crossings at Route No. 16 and Camp Lane. They are 1,400 feet apart, and since the railroad tracks were to be raised only six inches at Route No. 16 crossing, Camp Lane crossing cannot possibly be affected by carrying out the Board's plan (or the appellant's plan) for the elimination of the crossing of Route No. 16 (R. 45, 90).

Likewise there was no justification for the Justice to rely (R. 100) on the mere supposition, unsupported by any facts, of Mr. Remsen that, *if* a certain highway should be authorized by the legislature, traffic thereon *might* be diverted to this crossing (R. 208, 209). An assumption predicated upon an assumption does not justify the taking

of appellant's property or money to provide for such a remote contingency.

In the face of the undisputed testimony that there would be no obstruction to view under Plan "C," the Justice was not justified in holding:

> "It is asserted in the affidavits that a 6-degree curve is a perfectly safe curve. Very likely it is, where the road is on the level and the visibility is unimpaired; but *between the walls of a cut*, any curve is objectionable and usually dangerous" (R. 99).

There are *no* "walls of a cut" and the visibility *is* unimpaired under that plan.

The testimony that the visibility of highway travelers on the highway would not be impaired by the curves, was predicated expressly upon, and took into full acount, the nature and extent of the depression of the highway, as shown on the plan (R. 43, 44, 58, 68, 79, 80, 190, 191, 192, 193).

The Justice in his opinion (R. 99, 100) and the Court below (R. 15) both fell into the same error, the first in assuming that the appellant's figures "omit items which would go far toward equalizing matters" (R. 100) (the cost of the two plans), and the second, in stating

> "If, however, the cost of acquiring additional land is taken into account, this amount (the difference between cost of the two plans) would undoubtedly be considerably reduced, as found by the Commission and Justice Parker."

The difference in cost between the two plans cannot be disposed of in this casual manner. There was no evidence to support the statement of the Board. These statements are not only unsupported by, but are directly contrary to the evidence. Moreover, under the laws of New Jersey, such a property owner is not entitled to damages.

It has been decided by the courts of New Jersey that, when a portion of a street is vacated, persons owning lands upon the portion not vacated, are not deprived of any vested rights in property for which they are entitled to compensation (*State, Kean* v. *Elizabeth*, 54 N. J. L. 462).

The "damage to adjacent property" mentioned in Section 2 of the Fielder Act (Appendix "B"), relates only to legal damages. No consequential damages accrue to the owners of private property resulting from the exercise of the police powers. To the extent that the public welfare requires the exercise of such power, all persons affected are amenable thereto and bound thereby. In fact Section 4 of the Fielder Act provides:

> "Where the order of said board shall require changes in, or the removal of the property or construction of any • • • company or corporation, co-partnership or individual, they shall, at their own expense, move or change the grade or location of their property or constructions in conformity with the order of said board" (Appendix "B").

The Justice was not justified in stating in his opinion (R. 99):

> "The requirement of a straight road at such a place as this is essentially sound, and to turn a great state road at such a place from a straight line to a *crooked* one would be to court disaster."

The road proposed in Plan "C" is not "*crooked*."

Nor is it a sufficient warrant for taking $120,000 of appellant's money and its property, that:

> "No recipe has yet been found for preventing the careless motorist, and all too many of them are careless, from hugging the inside of a curve, in whatever direction he may be going" (R. 99).

The New Jersey Traffic Act (Chapter 174, N. J. P. L. 1915, pp. 285, 286) provides as follows:

> "2. (1) On all public roads, highways, turnpikes or streets, the following rules and regulations shall be effective:

> (2) A vehicle shall keep to the right, and when the improved portion of a road is of sufficient width, the vehicle shall keep to the right of the center of such road, except when passing a vehicle ahead."

In the revision of this act (Chapter 281 N. J. P. L. 1928, pp. 721, 733) Section 5, Article VIII contains the same requirement.

The appellant has no obligation, under the statutes or otherwise, to protect the "careless motorist" from a violation of the statute or to render the public highways fool-proof, nor was the Court below justified in following the Supreme Court Justice's views in this respect (R. 15) and holding that—

> "The action of the Public Utilities Commissioners would seem to be most reasonable" (R. 16).

The Opinion of the District Court.

The Court below, in its decision denying an interlocutory injunction, said: "The Court in determining what is reasonable does not substitute its own judgment for the determination of the Commission" (R. 14) and stated that it was "not obliged to choose between two methods." It also assumed that the Board had "perfectly good reasons for the choice" (R. 16). It is not a question of "choice between two methods"; it is a question of the legal rights and duties of the appellant.

It was because the Superior Court of Pennsylvania had substituted its "judgment for that of the Commission" (260 Pa. 289) that the Pennsylvania Supreme Court reversed the Superior Court's decision in the *Ohio Valley Water Company* case (*supra*), and it was precisely this error of the Pennsylvania Supreme Court that this Court corrected when it reversed that court and sent the case back for the purpose of having the Superior Court *substitute its own judgment for that of the Commission* if the facts in the case warranted it.

These statements of the Court below are the essence of its judgment both in denying an interlocutory injunction and in dismissing the bill of complaint, and constitute a denial of due process of law under the decisions of this Court. (*Ohio Valley Water Co.* v. *Borough of Ben Avon*, and other cases cited under Point III, subhead (c).)

The Court below quoted from Justice Holmes' opinion in the *Paterson* case (254 U. S. 395):

> "If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

In the first place the Court below therein begs the question. The principal issue in this case is that *it cannot reasonably* "be said that safety requires the change" in the manner ordered by the Board.

In the second place a new governmental policy toward the "bankruptcy" of the carriers and toward their "engagement in interstate commerce" has been since declared by Congress in the Transportation Act, 1920. (See cases under Point I.)

In the Court below appellant cited other cases than the *Los Angeles Station* case (264 U. S. 331) in support of its contentions under the Transportation Act, 1920, although none of them are referred to in its decision (R. 13-17). The Court's statement that—

> "Certainly, a fair return upon railroad property was never intended to be secured at the *peril* of the public using the highways of a state"

was not justified by the evidence. There was no evidence that the plan offered by appellant would create a "peril of the public using the highways of a state." On the contrary, every engineering witness testified that no danger or inconvenience would result from the adoption of that

plan. The opinion of the Court below did not refer to any of this evidence.

The Court below was not justified in saying that Plan "C" would require "the traveling public to go around three curves and a *longer distance* to arrive at the same place" (R. 16), when the undisputed testimony shows that the distance by Plan "C" is only 124 feet (R. 173) or 125 feet (R. 192) longer than by the Board's plan.

The appellant's claim of an agreement with the State Highway Commission was disposed of by the Court below in the following words:

> "Prior to the action of the Public Utility Commissioners, the State Highway Board had considered changing the route of the State Highway to meet the plans of the Railroad Company. No action was taken, however, beyond discussion; no contract was signed and the Highway Board requested initiation of the action taken by the Public Utility Commissioners and now under review."

This statement is erroneous, for the following reasons, as shown by the undisputed proof:

1. The plans for changing the route of the highway originated, not with appellant, but with the State Highway Commission itself, and it requested the appellant to accept that suggestion and pay $40,000 toward the cost (R. 135, 136), and the appellant consented to the proposal (R. 38, 39). The State Highway Engineer, at the direction of the State Highway Commission, prepared the plan accordingly (R. 136) and after the appellant and the State Highway Engineer had agreed upon all the details of dimensions, type of construction, quantities and character of materials, and everything else necessary to enable a contractor to carry out the plan, a complete set of general and detail plans, showing all of this information, was prepared and signed on behalf of the State Highway Commission by its State Highway Engineer and its Bridge

Engineer, and on behalf of the appellant by its Chief Engineer and its Bridge Engineer (Exhibit "F," R. 145-150, R. 39).

2. These negotiations amounted to more than "discussion." They resulted in a consummated agreement on every detail, officially approved by both parties (R. 136, 38, 39), which agreement was repeatedly defended by the State Highway Commission by formal motions and resolutions on its minutes, when the terms thereof were criticised by the local authorities (R. 137, 138, 139).

3. It is true that no formal written contract was signed (except the plans themselves), but the undisputed testimony is that all the details of the contract were agreed upon and approved by both parties (R. 38, 39), and the work of eliminating the crossing under the terms of that contract was actually begun by appellant and approximately $5,000 was expended by it in reliance thereon (R. 38). It is true that the State Highway Commission adopted a motion on March 24, 1925 (R. 143), (more than a year after it had agreed with appellant upon the plan and the division of the cost (R. 136) and more than three months after the plans had been signed and the terms of the contract had been agreed to) to instruct its State Highway Engineer (whom it had previously authorized to make that contract with the appellant) to make application to the Board for an order to eliminate this crossing. Such an application was never made to the Board, but if it had been made, our claim is that there was a binding contract in existence at that time, which was abrogated or impaired by the Board's order, as argued under Point II.

The appellant's petition for rehearing (R. 104) was denied without comment or opinion.

On the final hearing the Court below dismissed the bill of complaint (R. 1) without comment or further opinion.

V.

The Court below erred in refusing to grant a permanent injunction, as prayed in the bill of complaint, and in dismissing the bill.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to grant to the appellant a permanent injunction restraining the enforcement of said order of the Board of Public Utility Commissioners.

E. H. BURGESS,
GEORGE S. HOBART,
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APPENDIX "A."

Summary of Testimony Before the Board.

I.

The testimony before the Board as contained in the stipulated statement of evidence (R-177) including Exhibit S-1 (R-172) is as follows:—

Mr. Mead, the Chief Engineer of the Board, at the direction of the Board, prepared and presented a plan (Part of Exhibit "A" annexed to and made a part of the order of the Board) (R-116) which, as finally revised and adopted (R-188) proposed to depress Highway Route #16, and elevate the tracks 6 inches at the present location of the crossing, providing highway grade approaches of 3 percent on the north side and 3.16 percent on the south side of the railroad tracks (Exhibit "H," R. 152) at a cost of $307,950. (R-188) plus $6,000. to provide a detour for highway traffic during construction. (R-189). It provides an undercrossing 66 feet wide between abutments (R-180) with a vertical clearance of 14 feet (R-179); with a 20-foot roadway on each side of a center pier (R-189), and a sidewalk of a clear width of 8' 6" on each side of the undercrossing (R-188). It also provides for the closing of a grade crossing at Camp Lane (R-188). "A comparatively unimportant route". (R-178) (located approximately 1220 feet east of the Route 16 crossing (R-45), and the construction of a connecting road (for a distance of approximately 1940 feet (R-45)) along the south side of the railroad between Camp Lane and Route 16 (R-179) at a cost of $10,450. (R-188) or a total cost of $324,400. (Exhibit "J" R. 42-45). This plan requires the acquisition of no additional land (if retaining walls are provided along the depression), except for the 1940 feet of connecting road between Camp Lane and Route 16 (R-180). The estimate of cost includes nothing

for the acquisition of this land nor for any consequential damages to abutting property which might result from the depression of the highway. The plan provides girders on the outside and between the tracks of the railroad which project above the top of the rail about six inches (R-180). The Camp Lane connection can be located almost anywhere since it would cross only open fields (R-179). The only feasible way of eliminating this crossing is by carrying the highway under the railroad. Mr. Mead made no study or plan of the elimination of the crossing by relocation of the highway (R-180). The time required to do the work according to his plan is one year (R-188). There are now no sidewalks on the highway on either side of the crossing and the plan merely provided for space for sidewalks (R-189). The length of the bridge, measured along the railroad would be 134 feet and the width measured along the highway would be 105 feet. (R-180).

Mr. Mead also presented records of highway and railroad traffic at Route 16 crossing and at Camp Lane crossing (R-178), (Exhibit C-5, fol. 125-a, R170-171). Also a series of photographs showing views from all four directions at each crossing. (Exhibit C-4, R-170-171), and an Atlas sheet showing the location of the crossing and the houses and buildings in the vicinity. (Exhibit C-6, R-170-171). He testified that Route 16 crossing is used a great deal and trains pass at high speed frequently. The angle of the crossing is 29 degrees 30 minutes; that in his opinion Route 16 crossing is dangerous to public safety and travel is impeded by virtue of the grade crossing. (R-180). He did not know what the present width of the highway Route 16 is, but he was informed that it was being widened to 66 feet (R-189). With respect to cost, the girders of the bridge vary as the square of the plan, and the floor varies directly as the span so that with respect to the floor a span twice as long will cost twice as much

and with respect to the girders a span twice as long will cost four times as much (R-189).

Mr. Johnston, Grade Crossing Engineer of the appellant, presented a plan known as Plan "C" providing for diverting the alignment of highway Route 16 to pass under the railroad at a point 150 feet east of the depot (400 feet east of Route No. 16, R 37). The relocated highway would be constructed with 6 degree curves (radius 955.37 feet). The bridge to consist of a two span flat concrete slab top with no girders projecting above the rails. (R-182). There is serious objection to having girders protrude above the rails (as contemplated in the plan presented by Mr. Mead and adopted by the Board), where trains are stopping at the station (located at this point) on account of the possible danger that passengers might incur in alighting or getting on the train in stumbling over the girders. He proposed a concrete slab top for that reason and also for the reason that it is objectionable in any event to put girders between the tracks of a railroad. This form of bridge is also proposed as being more economical than steel construction. Under this plan the grades of the highway approaches would be 3.2% on the north side and 1.1% on the south side of the railroad. (Exhibit "H", R 152.) The width of this bridge measured along the highway is 75 feet. The relocation of the highway is proposed because it shortens the length of the bridge by changing the angle of the crossing from the present 29 degrees to the proposed 54 degrees. The relocation of the highway therein proposed would facilitate the construction of the Camp Lane connecting road proposed by Mr. Mead. A connecting road from Camp Lane to Route 16 could be constructed under this plan at a distance of 168 feet south of the center line of the railroad. (Exhibit "H," R. 152.) The width of this bridge than if Route 16 crossing was eliminated on its present location, (R-183), and would intersect Route 16 at a

greater angle. The Camp Lane connecting road as proposed in the plan of Mr. Mead would involve a very acute angle unless it was swung around. The cost of the Mead plan is at least double that of Plan "C". Plan "C" calls for the relocation of Route 16 for a distance of 900 feet or more, (950 feet, R 37) east of the crossing and for 1200 feet (1300 feet, R 37) west (or south) of the crossing. In stating that the Board's plan would cost twice as much as Plan "C", he took into consideration that under Plan "C" land would have to be purchased for the relocated portion of Route 16. The difference between Johnston's figures and Mead's figures is largely the cost of the bridge and the raising of the tracks. The sidewalks proposed by Mr. Mead would also increase the cost, and the cost of drainage at the undercrossing at the present location would be more expensive than at the proposed location. The junction of Camp Lane road with Route 16 in Plan "C" is located 55 feet south of the railroad with a depression of 7 feet. But this junction could be constructed so that the highway travellers would have an unobstructed view in both directions (Exhibit "G", R 151). Plan "C" contemplated no elevation of the railroad tracks and provides the same 14 foot underclearance at Route 16, undercrossing, as the Board's plan. It also provided for a straight highway approach of the undercrossing of 65 feet on the south side and 200 feet on the north side, measured from the ends of the center pier, respectively (R 184). The driver of a vehicle moving on the 6-degree curves, provided in Plan "C," would be able to see ahead in the line of travel for a distance of 500 feet and would at all times have a clear view for that distance, but since this road is out in the country where it is flat on each side, there would be a view for an indefinite distance. (R 186-187). Plan "C" in substantially the same form as offered by Mr. Johnston, with the same type of elimination, curvature and location of columns, was approved by the State Highway Engineer before

the proceedings before the Board were commenced. (R-190, 192). The only difference being in details—the plan approved by the State Highway Engineer (and the State Highway Commission) showed more detailed information than is shown on Plan "C" as presented to the Board (R-192). The estimated cost of carrying out Plan "C" is $145,024.47 (estimate offered before the Board as Exhibit RR-8, Exhibit I, R-153-155). A further estimate was made providing for a Camp Lane road connection, at an additional cost of $7,660.23 (offered before the Board as Exhibit RR-9, Exhibit I, R-155), making a combined cost of the project $152,684.70, as compared with Mead's estimate of $318,400. (plus $6,000. for a detour pending the construction). Under Plan "C" no detour would be required since during construction traffic would continue to use existing crossing. Johnston's estimate includes $1,000. for right of way for the relocation of Route 16 and the deepening of brook to provide drainage for the proposed undercrossing and damage to property owners. (R-190). The cost of this property was estimated at what was considered a fair value for it. The cost of possible condemnation proceedings to acquire it was included in the engineering and incidental items of the estimate intended for contingencies, such as condemnation proceedings. No damage to property cut-off from the state highway by reason of the relocation, was included because such damages are not recognized as legal damages. Damages to other properties which were considered to be affected by the relocation were included in the items for engineering and incidentals. The proposed relocation of Route No. 16 increases its length by only 125 feet. Under Plan "C" the grade of the highway approaches to the undercrossing would still be 3.29% on the north side and 1.1% on the south side of the railroad and the length of these approaches would be 500 feet and 800 feet, respectively. The grade on the north approach would be approximately the same, but the grade of the south approach is much

less on Plan "C", than on the Board's plan. The length of the undercrossing on Plan "C" is 70 feet and on the Board's plan 110 feet (R-192). Plan "C" provides no sidewalk spaces, but at a subsequent hearing, Johnston suggested the possible enlargement of Plan "C" so as to provide a 20 foot roadway on each side of the center pier and a sidewalk 9 feet wide on each side of the undercrossing. (R-191). The estimated cost of this enlargement is $52,500. (Exhibit I, R-155, Note), and it would provide the same number and width of roadways, the same vertical underclearance and the same number of sidewalks (each 6" wider) as the plan offered by Mr. Mead and adopted by the Board. (R-193, 212), and the total cost of the enlarged plan would be $205,184.70 (R 191) (as compared with $324,400. for the Board's plan).

The railroad property at this point is in the neighborhood of 240 ft wide; the right of way itself is 100 feet wide (R 211).

Mr. Johnston testified that a motorist passing around a 6 degree curve, as proposed in Plan "C", has an ample view for a distance of at least 500 or 600 feet ahead; a 6 degree curve will not impede travel in the least and will not obscure or endanger a traveller passing around the curve (R190); that on the same highway (Route #16) where its permanent improvement has been completed, there are, in a distance of 27.38 miles, 18 curves that are in excess of 6 degrees (R 191, Exhibit "D", R. 128). The grades of the approaches to the proposed undercrossing in Plan "C", on either side, enable a highway traveller to see under the bridge. The fact that the highway is depressed would not affect the traveler's view within a range of 500 feet. The descent to the undercrossing begins 800 feet south, and 500 feet north of the crossing. As a traveller starts to descend the approaches to the undercrossing he can look through under the bridge for a distance of at least 600 or 700 feet. On this account

the grade of the approach on the south side of the railroad is more favorable under Plan "C" than in the Board's plan. The grade of the approach on the north side is approximately the same in both plans (R. 192). With respect to the obstruction of the bridge to views of highway travellers on these approaches, the bridge would constitute a greater obstruction under the Board's plan than under Plan "C", on account of the longer undercrossing required by the former plan (R. 193).

(further testimony of Mr. Johnston is given in the summary of the testimony contained in the affidavits in this case.)

Mrs. Kremer testified that she owned a store and an acre of ground which would be taken off of the state highway by the relocation proposed by Plan "C" which would require people coming to the store "To come down and go up again", which she thought would damage her property. She offered no other objection to Plan "C". (R-185).

Mr. Young testified that he owned land on this road and objected strongly "against a curve in this road for no reason". He objected to the construction of the junction of Camp Lane connection with Route No. 16, because it was too close to the abutment of the bridge, which he thought would create a dangerous situation because Camp Lane connection would connect with Route No. 16 on a curve. (R-185), and the abutment of the bridge would cut off the driver's view as he came into the state highway. This he thought was a dangerous situation. He thought this connection could be constructed with the bank cut off or lowered so that a vehicle coming out of the Camp Lane connection would have a clear view. (R-186). This objection was met by changing the location of this junction on Plan "C" to a point 250 feet south of the railroad so that the depression at the junc-

tion would only be 3½ feet below the level of the surrounding ground, thus providing an unobstructed view to travellers on Camp Lane connection or on Route No. 16. (R 189), and providing for such junctions at right angles with Route No. 16 (Exhibit "G" R-151) (R-190). Mr. Young objected to the proposed curves in the relocated roadway. He said they had no state highway vehicle law or traffic signs to stop traffic and that they had fast traffic on the road (R-185). (This is a mistake since Section 16 of the Motor Vehicle Act (N. J. P. L. 1921, p. 643) prescribes the speed at which motor vehicles shall be operated in the various localities and under various conditions therein described and limits the speed of an automobile in "open country" to 30 miles an hour. (4 Cum. Suppl. to Comp. Stat. 1996). Chapter 244 (N. J. P. L. 1927, p. 461, Sec. 4), amends the traffic act by providing:—

> "• • • all state highway routes, or any road, street, highway or turnpike or section thereof, which may be designated by ordinance of the Board or body charged with the duty of the maintenance thereof, shall be known as a 'Full Stop Street'"

to be designated by a sign prescribed in the act and when such a sign has been erected—

> "It shall be unlawful for the driver of any vehicle to enter or cross any 'Full Stop Streets' so designated and marked, until he first brings his vehicle to a complete stop at a point not less than ten feet from the curb line, or, if no curb line, the nearest side of such 'Full Stop Street' • • •". (p. 461).

Mr. Young testified that he was a contractor and has built roads and bridges; that there are a great many places around the state where more than a 6% curve is constructed on improved highway; that it would be unusual to build a curve of this decree where the road is straight; that there are a lot of roads with the same curve; a lot more have to be when circumstances warrant

it being there, (R-185); that his principal objection is making a curve in a straight road (R-186).

Mr. Ketter testified that he owned property ½ mile south of the location in question, and the elimination of the crossing would affect him insofar as he travels the road twice a day. He considered it dangerous to go underneath that railroad and that curve. He knows what it means to have the view obstructed. "It wouldn't affect the property in any way". If for a distance of 350 feet, where the new road passed under the railroad, it would be on a straight line, the view would not be obstructed going towards the under-pass. But if one was travelling 35 miles an hour it would not take long to reach the point. If he could see a vehicle 500 feet ahead when rounding a 6 degree curve, he would not contend that the view was obstructed (R. 186). Such a view is provided by Plan "C" (R-186-187).

Mr. Wright testified that he was the owner of property on the south and west side of the station. His personal objection ("outside of the objection against the curve") was to the dead ends of the present road produced by closing the crossing under the railroad at the present location and relocating the road as proposed in Plan "C". He bought his place because it was on a developed road and handy to the station and Somerville. He thought "these gentlemen" hadn't taken into account damages they would have to pay him if they go around the curve. If they would give him the property between the new and old road it would compensate his damages. He had two children who go to school at Somerville by bus. Now they go to the corner at the end of his line to get the bus. If the road was relocated they would have to walk to another corner across the road, crossing the traffic on the highway. (R-187)

Mr. Epps, (Jr.) testified that he objected to the plan for Camp Lane road as suggested by Mr. Johnston but

his objection would be met if the proposed connecting road would start somewhere near the elbow of the present Camp Lane road and go about 200 feet south of the road (R-201) (This objection was met by the change of this connecting road at a point 250 feet south of the railroad (R-189).

Mr. Goodkind, Bridge Engineer of the State Highway Commission testified that the commission's improvement on either side of the railroad indicates an acquisition insufficient properly to obtain a 66 foot right of way, but that the existing right of way is 33 feet wide. (R-201).

Mr. Remsen testified that he was the director of the Board of Freeholders of Somerset County (R-207); that he is familiar with Route No. 16, and that several curves therein have been reduced (R-209)—at six points mentioned, but he does not say what the curve was either before or after the change; he has observed the policy of the Highway Commission in the construction of roads to eliminate curves wherever possible and he knows of no instance where curves have been placed in a straight road. He referred to a bill before the legislature for a proposed new highway system which, if constructed, would probably, (but not necessarily), carry its traffic through Route No. 16 at the place of the crossing. If that system was constructed and should carry its traffic over Route No. 16, it would add to the traffic conditions on the route (R-208); that the new highway if constructed would turn its traffic into Route No. 16 is "the conclusion anyone would draw, knowing the territory about these locations." The Board of Freeholders have been fighting to keep this straight line in. Public sentiment in Somerset County is very much for a straight line. "I do not think it is a safe and practicable plan to put this curve in this highway at this point." (R-209)

Mr. Young testified that he resides in the vicinity of the proposed underpass and is familiar with Route No.

16, at that location. There is a 6 degree curve in the highway about one-quarter mile from the crossing. He testified to two accidents happening there, but his statement of the cause was merely his conclusion. (R 209). Near the property of Kaiser there was a curve about 6 degrees in the old highway that was eliminated by the construction of the new highway. (R 210).

Mr. Crammer testified that he owns property which would be affected in value by the proposed change in Route No. 16. This property is used for a store and would be off the road. (This is the same store referred to by Mrs. Cremer.) Another piece of property would be between him and the state highway. If the state highway remained at its present location, he would not accept an offer of $20,000 for his property. If the state highway is relocated as proposed in Plan "C", "I guess my property is worth nothing, or it would come down to a few hundred dollars of property and the main thing is the business would be gone as far as I can see as a business man." (R 210). (There was no testimony as to the value of his property or how much, if any, it would be damaged by the relocation of the highway.)

Mr. Epps (Sr.) testified that he was in the lumber and coal business and lived within a few hundred yards of the proposed undercrossing; that he is more or less familiar with real estate values. He thinks the proposed relocation would damage Mr. Wright's property "to the extent of one-half at least". He did not know what Mr. Wright's acreage was although he is familiar with the house and property, generally. This change would cut Mr. Wright off from the highway, but he could find access to the new highway by using the present highway. (R 210). (There was no testimony as to the value of Mr. Wright's property).

Mr. Hill testified that he was President of the Board of Education of Hillsboro Township. Scholars cross

and recross this road from the north side to the Liberty School house located about one-quarter of a mile south of the railroad track. There are scholars who come from the north of the track. All the high school children are transported to Somerville in buses. Parents have appealed to him to use his influence to keep the road straight. He does not feel it is safe for children to pass and repass on a curve. "I consider that it is absolutely unsafe". The smaller children walk from the north side of the railroad to the Liberty School to the south side. The greater area of the school district is north of the crossing. (R-211). He did not know whether the number of students attending from the north is the largest. In his opinion it would be more dangerous for children to walk through an underpass on this curve than to walk through the underpass on a straight highway. (R-212) (Plan "C" proposes an undercrossing on a tangent 265 feet (R-184) plus 75 feet long (R-183), or a total of 340 feet long with an unobstructed view of the highway for a distance of 500 or 600 feet ahead. (R-190)). His experience is that all traffic cut corners and they will cut corners on the curves. (R-212). (He did not testify how many children attend at the Liberty School house or how many of the children live north of the crossing. For those who do live north of the crossing the increased distance they would have to travel by the relocated highway is 125 feet (R-173), or 125 feet (R-192).

Mr. Wasser, former State Highway Engineer, was employed by the Freeholders of Somerset County to make an investigation and report in opposition to Plan "C." His report dated March 9, 1925 (Exhibit S. 1, R. 172), was made to the Freeholders for the purpose of opposing Plan "C" before the State Highway Commission. It was afterwards introduced in evidence before the Board. Among his findings are the following:

> "Third. That the part of the present highway affected by a straight line is about 124 feet shorter

than the distance involved in the relocation as proposed" (R. 173 bottom).

"Fourth. That the angle at the crossing is sharper along the line of the present highway than at the proposed location and it naturally increases the total length of the structure if located on the line of the present highway. * * *

"As to the greater expense attached to the elimination if made on the line of the present highway rather than on the proposed line, I have to say:

"It is true that the structure will be longer by about 47 feet, making a total length of the covered portion of about 121 ft. as compared to 74 feet on the proposed location, but the increased cost will not be proportional to the increased length of the structure and were it not for the difference in cost of handling traffic, I do not believe the increased cost would have been mentioned. However, so far as the state is concerned, there would be no difference in cost of the structure,—it being a railroad proposition that comes within the provisions of the Fielder Grade Crossing Act. P. L. 1913, p. 91" (R. 174, 175).

At the hearing before the Board Mr. Wasser testified that he objected to Plan "C" because the present highway where it crosses the line of the railroad is on a tangent and the State Highway Commission is spending millions of dollars to straighten all highways. To place the highway at the new location as shown by the plan prepared by the Highway Department (Plan "C") would make a curve in the highway. He also testified:

"and another thing in favor of the new location was that the angle was not so sharp. * * *. It would be cheaper in the new location, * * *" (R. 194).

In his opinion the plan on the present line of the highway was more practical and desirable. His objection was both on account of the center column (a feature which the

Board adopted in its own plan) and the curvature in the road, but principally to the curve. He further testified:

> "I am not speaking of the danger of the curve. A 6-degree curve is a safe curve. If it is not necessary to change the alignment of the road it is poor policy to change it, in view of the fact of all the money being spent to straighten the highways. A curve would not be more dangerous with a bridge than without it; that is, a six-degree curve, that is perfectly safe even with the bridge there * * *. I agree that the elimination project as a whole will be considerably less expensive if you put in this curve than if you go through on a straight line. As an engineer I think it advisable to consider matters of economy in the expenditure of the public or even private moneys, provided you do not produce a condition that is dangerous or inconvenient. * * * A six-degree curve seems to be an accessible curve for all conditions" (R. 195).
>
> "A six-degree curve is safe. The fact that this curve would be in connection with an under-pass with tracks elevated above and with columns or pillars in the center of it, would not change my opinion at all" (R. 196).

The witnesses Vannemann and Diehl also testified for the appellant before the Board but, as their affidavits in this case contain substantially the same testimony as they gave before the Board, their testimony is included in the following summary of the testimony in this case.

II.

Summary of Affidavits.

The Qualifications of the Witnesses for the Appellant.

At the hearing before the Board and in the affidavits annexed to the bill of complaint and presented on the return of the order to show cause, appellant presented the following witnesses:

Mr. William R. Johnston is a graduate of Cornell University as a civil engineer. For eight years he was Terminal Engineer, and for the past two years has been Engineer of Grade Crossings of the appellant. He has had twenty-two years' experience in railroad engineering exclusively (R. 51).

Mr. George T. Hand has been engaged in railroad and highway crossing engineering projects for the past thirty-eight years, and is Chief Engineer of the appellant in full charge and supervision of all engineering and construction projects for its entire railroad (R. 57, 58).

Mr. George C. Diehl is a civil engineer who has specialized in highway engineering for over thirty years. For thirty-two years he has been connected with the Highway Department of the State of New York (ever since the passage of the first highway acts) as consulting engineer. For the past twenty-nine years he has also been County Engineer of Erie County (New York), which is the largest county in the state (and includes the City of Buffalo), and makes the largest expenditures for highways of any county in that state. During these thirty odd years he has also been consulting engineer for more than fifty different municipalities. For twelve years he was head of the National Road Improvement Committee of the American Automobile Association, and as such made a study of highway conditions in every state in the United States. Since the advent of the automobile he has had a great deal to do with the improvement of highways and the

elimination of grade crossings (R. 74). He has made a thorough study of 356 railroad grade crossings in Erie County (New York) and a considerable number elsewhere in New York State. He has had direct supervision of the building of 2,000 miles of road in Erie County, and between 8,000 and 10,000 miles of road elsewhere in New York State. He has inspected the crossing in question, made a study of the situation of the crossing, the highway and the general condition at both and of the locality, and carefully examined Plan "C," and is familiar with the scheme of elimination contemplated thereby. He was present and testified at the hearing of the Board on March 17, 1927 (R. 75, 202).

Mr. Charles R. Vanneman is a graduate of Cornell University as a civil engineer. For five and a half years he was employed by the Pennsylvania Railroad as a civil engineer in the maintenance, operating and construction departments. For the past seventeen years he has been associated as an engineer with the Public Service Commission of New York State as Chief Engineer of the Division of Transportation, Chief of the Division of Steam Railroads, Engineer of Grade Crossings, successively, and for the past six years has been and now is Chief Engineer in charge of all engineering matters pertaining to public utilities subject to the jurisdiction of that commission. All grade crossing elimination work in the State of New York, over which the Public Service Commission has control, comes entirely under his jurisdiction from the inception of the project, through the hearings (many of which he personally conducts), and, upon the completion of the hearings, he recommends to the commission for adoption an order determining how each elimination shall be made (R. 65, 196). He examined the crossing in question and made a study of the conditions existing there, and of Plan "C" (R. 69), and testified at the hearing before the Board of Public Utility Commissioners on February 10, 1927 (R. 66, 196).

Curvature.

The sole objection to Plan "C" (as revised) related to curvature. On that plan both ends of the relocated section are curved, not to exceed 6 degrees at any point, but the approaches to the under-crossing are straight for a distance of 130 feet on the southerly side, and for a distance of 245 feet on the northerly side, providing a tangent 375 feet long at the under-crossing. The greater part of the curved section of the relocated highway on both sides of the railroad is outside of any depression and is at or above the level of the surrounding country (R. 43, 80).

Mr. Diehl states the different circumstances which render curves either necessary or desirable. He says that the general practice where highways cross streams is to introduce curves for the purpose of bringing the highway across the stream as nearly at right angles as possible, and that in the elimination of grade crossings the practice is seldom, if ever, to cross at a sharper angle than 45 degrees (R. 83).

To illustrate the significance of a 6-degree curve, he says that if a copper penny is placed upon the pavement 10 feet in front of an automobile so that the right edge of the penny is absolutely in a straight line with the front wheel of the automobile; if the automobile proceeds on a 6-degree curve the wheel would pass over the left edge of the penny. A 6-degree curve produces a divergence from a straight line, in the course of that 10 feet, of only five-eighths of an inch. Mr. Diehl says that this example also illustrates that even the most careful driver, using extreme caution and accuracy, cannot travel in an absolutely straight line and will, in the ordinary course of travel on a straight road, describe arcs that are equivalent to a 6-degree curve (R. 84).

Plan "C," with its 6-degree curves, was prepared and approved by the State Highway Commission (R. 39, 136).

This curvature was not an inadvertence. It was intentional and for a purpose. It was proposed and adopted by the State Highway Commission "on account of the considerable saving that would be effected thereby," and because "a much shorter under-pass and speedier construction would be accomplished by means of the new line as adopted" (Minutes, April 22, 1924) (R. 137), and to avoid "an additional 42 feet of covered roadway" (Minutes, June 18, 1924) (R. 138).

The several discussions of the local residents who objected to these curves produced in the minds of the members of the State Highway Commission, "no additional facts not already before the State Highway Engineer or State Highway Department • • • which would lead the Highway Commission to alter its opinion in regard to the advisability of the change as contemplated in the original plans (Plan "C") (Minutes, June 24, 1924) (R. 139).

This plan was not considered objectionable to that commission because it "involved only a six degree curve which is not considered serious by the State Highway Commission" (Minutes, April 22, 1924) (R. 137). A 6-degree curve was not a novelty in the State Highway system. At the hearing which the State Highway Commission held at Somerville for the benefit of the local objectors, Commissioner Jelin "explained to the residents that if a straight line was adopted for Route 16 there would be an additional 42 feet of covered roadway over that proposed" and he "pointed out that there are other points on this route where the curvature is 6 degrees or more." In his report to his fellow Commissioners he said "that he had no recommendations to make" and "that at the conclusion of the meeting it appeared that all of the questions in the minds of the local residents had been cleared up" (Minutes, June 18, 1924) (R. 138, 139). Exhibit "D" (R. 128) shows that between the Morris Township line and Labaw's

Corner, a distance of 27.38 miles, on the same highway, there are eighteen other locations where curves exceeding 6 degrees exist on the improved and permanent alignment of this highway.

Mr. Diehl says:

Curvatures of 6 degrees, as proposed in Plan "C," are not dangerous and do not decrease the facilities for traveling. A series of tests and experiments conducted by him over a period of seven or eight years, to ascertain what degree of curvature would be dangerous or would curtail or impede traffic, shows that even in the vicinity of centers of large populations on highways of two or more lanes of traffic, 6-degree curves do not increase danger or diminish the capacity of the highway, and create no substantial difference in point of danger or highway capacity from those of a straight road (R. 76). In a number of instances, which he mentions in his affidavit, he has recommended on important main state highways having four 10-foot lanes of traffic, reverse 6-degree curves to accomplish a grade crossing elimination on straight highways by the construction of an under-pass on a less acute angle, exactly as proposed in Plan "C" (R. 77, 78). The fact that part of the relocated highway will be depressed, or that these depressions approach a bridge, does not alter his opinion, as the road is laid out on Plan "C." The adoption of Plan "C" will create no more danger or inconvenience to public travel than there would be on the straight highway contemplated by the Board's plan. So far as the center piers are concerned, there will be no difference, in point of danger or inconvenience, between Plan "C" and the Board's plan (R. 78).

His tests show that an automobile can be driven at speeds up to forty or forty five miles per hour on a 6-degree curve with the same degree of safety as on a straight road.

At a speed of forty or forty-five miles per hour an automobile can be brought to a stop in a distance of less than 200 feet, and on curved sections of highways, containing no obstructions to view within that distance, it is unnecessary and uneconomical to reduce 6-degree curves.

He is familiar with snow and ice conditions on highways and Plan "C" would not present any danger or inconvenience to public travel under ice and snow conditions. These conditions always slow up travel whether on straight or curved highways, and these conditions would not alter or affect the relative conditions as between a straight road and a 6-degree curve (R. 82).

The center pier on Plan "C" is not on or near a curve. Plan "C" provides straight approaches to the bridge of 130 feet long on the south side, and of 245 feet on the north side. As a matter of fact, there are certain advantages on a 6-degree curve to drivers of vehicles following other vehicles, especially if the preceding vehicle is a large truck that obstructs the view ahead (R. 80, 81). While it is true that the State Highway Commissions of New York and New Jersey are constantly eliminating curves, they are not spending any money to eliminate 6-degree curves. He is now engaged in projects for the elimination of at least 100 curves on New York State Highways, but all of them are sharper than 6 degrees. At the same time he is, in a number of instances, changing straight highways by introducing 6-degree curves (R. 81, 82).

He points out that in driving on a perfectly straight highway, vehicles frequently describe arcs equivalent to a 6-degree curvature, especially in passing other vehicles or objects on the road (R. 76).

Mr. Diehl says that curves are necessary and desirable in many cases, of which he specifies five, including the crossing of streams and railroads. In the case of rail-

roads it is desirable to cross, as nearly as possible, at right angles and seldom, if ever, at angles less than 45 degrees (R. 83). A radius of 1,000 feet (6 degrees) assures every convenience as far as rates of speed, safety and capacity of highways are concerned, as can be obtained on a straight highway (R. 84).

Mr. Vanneman says:

In his opinion a 6-degree curve on an important highway is perfectly safe and gives his reasons (R. 68). He cites a number of instances in New York State where, under circumstances like the present, the Public Service Commission of that state, on his recommendation, has eliminated grade crossings on straight highways by relocating the road and introducing 6-degree curves to shorten the under-crossing (R. 66, 69, 70). Plan "C" will not result in any lessening of the capacity of the highway to carry traffic or increase the dangers to such travel as compared with a straight road (R. 68). A major portion of highway accidents occur because of collisions of one vehicle with another on tangents. (This is also the opinion of the New Jersey State Highway Engineer (R. 173).) The statistics of New York State for 1925 show that, although there is a great deal of curvature on the highways of that state, owing to its hilly and mountainous nature, there were 23,880 automobile accidents on straight, level roads and only 1,316 such accidents on curves (R. 67, 68).

Within certain limits, travel on a curve is safer than on a straight road. A curve with a radius of 1,000 feet (6 degrees), with the usual super-elevation, is so slight that the highway traveler does not know he is on a curve. On such a curve there would be no danger of skidding unless the traveler tried to operate at sixty miles per hour on an icy roadway. In a fog or at night, a 6-degree curve is no more dangerous than a straight road (R. 68).

Mr. Wasser, the only engineer who testified against Plan "C" (revised) at the hearings before the Board (R. 194), he objected to curves as a matter of policy, but he admitted that "a 6-degree curve is a safe curve," "is perfectly safe." "A 6-degree curve seems to be an *accessible* curve for all conditions" (R. 195).

There was no engineering or other expert testimony that a 6-degree curve was in the least degree dangerous (R. 41).

Depression.

Of the entire length (2,250 feet) of this relocated section, only 900 feet is depressed, that is, 500 feet on the northerly side, and 400 feet on the southerly side, of the center line of the proposed under-crossing. On the northerly side of the railroad the northerly 265 feet of this 500 feet of depressed roadway is on a curve, the deepest point of which is 5½ feet, and only 100 feet thereof is more than 3 feet below the general level of the adjacent land. On the southerly side of the railroad the southerly 240 feet of the depressed roadway is on a curve, the deepest point of which is 7 feet, but only 60 feet thereof is more than 5 feet below the general level of the adjacent land (R. 43, 58).

Highway Embankments.

The embankments on each side of the depressed section of the roadway are sloped at the uniform rate of 1½ feet horizontal recession to each 1 foot of vertical rise. So that these embankments recede from the roadside (the outside of the gutters) at the rate of 9 feet for each 6 feet of elevation (R. 43).

Views.

Taking into account the recession of the sloping embankment, at no point in the entire 900 feet of depressed

roadway is the embankment near enough or high enough to interfere, in the least degree, with the view of the driver of any class of vehicles (R. 43, 44, 79, 80).

Mr. Diehl points out that a slight curve, like a 6-degree curve, affords a better view than a straight road, particularly for the driver of a vehicle that is following another vehicle like a big truck. This is true of the view ahead, both as to vehicles going in the same, or coming from the opposite direction (R. 80).

Mr. Vanneman, in his affidavit, says that Plan "C" provides an ample view through the structure (R. 68).

Division of Travel.

The Board's plan and Plan "C" both call for the center pier. This type of construction is the accepted standard for under-crossings of more than 30 or 32 feet in width, and is desirable for the purpose of dividing the line of travel on the highway, because of the natural tendency of highway travelers to pull away from the curb toward the center, and the resulting cutting down of a four-line to a two-line traffic highway. In cases of a two-line highway, such as is contemplated by Plan "C," such a condition could not prevail. By this plan two lines of traffic can pass simultaneously (in opposite directions) on each roadway under the bridge (R. 67).

Feasibility and Practicability.

This plan was designed and originally prepared by the State Highway Engineer, and after some revisions it was agreed to by the Railroad Company, and officially approved and adopted by the State Highway Commission, and, by its direction, the State Highway Engineer and the Bridge Engineer of the Commission signed it on December 12, 1924 (R. 39, Exhibit "F," R. 145-150). Its design, feasibility, suitability and practicability were not only

officially determined by the Commission, but were repeatedly approved and defended by it (Minutes, March 11, R. 136, April 22, R. 137, June 18, R. 138, and June 24, 1924, R. 139). This action was never modified or rescinded by the State Highway Commission (Certified Minutes of State Highway Commission, R. 134 to 144, inc.).

Mr. Johnston says, in his affidavit, that Plan "C" is an entirely feasible and practicable plan and that the Board's plan for a straight highway has no practical advantages over Plan "C," in spite of the vast difference in cost (R. 44).

Mr. Hand says that Plan "C" provides a safe, adequate and proper means of eliminating this crossing in a manner that fully meets the requirements of public safety and convenience and without introducing any element of danger to or impediment of traffic to the fullest capacity of the highway; that the plan adopted by the Board contains no elements of safety or convenience to highway traffic to justify the increased cost (R. 58).

Mr. Vanneman says that he has examined the crossing and studied Plan "C" and has supervised and approved plans similar thereto at a number of locations on important state highways in New York State, which he mentions (R. 69), that Plan "C" is entirely feasible and practicable and safe for the crossing in question and would not result, in any way, in lessening the capacity of the highway to carry traffic or in any condition of danger to such travel (R. 67).

Property Damages.

The railroad engineers' estimates included $1,000 for land required for and damages that might result to other property from the adoption of Plan "C." This amount was, in the judgment of plaintiff's engineers and real estate experts, sufficient for the purpose, since the appel-

lant owned a large part of the land required and the property consists of farm land in a rural farming community and no privately owned buildings or improvements would be affected (R. 44). The Board's estimate contained nothing for property damages (R. 93).

Sidewalks.

Plan "C," as prepared and adopted by the State Highway Commission, provided no sidewalk spaces.

The Board's plan required a sidewalk with a clear width of 8 feet 6 inches on *each* side of the highway (R. 91).

There was no evidence before the Board of Public Utility Commissioners to show that two sidewalks were necessary. (See stipulated statement of testimony (R. 178 to 212 incl.) And Mr. Johnston says that they are unnecessary, since the crossing is in a rural locality, and there are no sidewalks along Highway Route No. 16 on either side of the railroad or in the vicinity of the crossing; that at most, public convenience would not require more than one sidewalk; and that the increased cost of providing two sidewalks is unjustified by the evidence or by public necessity and convenience; the cost of the plan is materially increased by the provision of sidewalk spaces (R. 51).

Camp Lane Crossing.

This crossing is located on an unimportant (R. 178) unimproved road, 1,220 feet easterly of Route No. 16 crossing (R. 45). The elimination of this crossing is not necessary to and will not be physically affected by the elimination of Plan "C" according to either Plan "C" or the Board's plan (R. 46). However, the Board ordered the closing of this crossing, and the construction by the plaintiff of a connecting road 1,940 feet long between Camp Lane and Route No. 16 along the southerly side of,

and at distances ranging from 225 to 420 feet from the railroad (Map, part of Exhibit "A," R. 116-117), (R. 45, 46) at a cost estimated by the Board's Engineer according to the Board's plans at $10,450.00 (R. 93, 188, Exhibit "J," R. 158), and by the appellant's engineer according to Plan "C," at $7,660.23 (Exhibit "J," R. 155).

The plaintiff offered to close the Camp Lane crossing and build a similar but shorter connecting road on the same side, but closer to the railroad (Exhibit "G," 151). This offer was rejected by the Board (R. 125).

The affidavit of Mr. Steele (R. 72, 73) shows the following highway traffic record at Camp Lane crossing for Friday, June 3rd, Saturday, June 4th, and Sunday, June 5, 1927, covering the time from 7 A. M. to 8 P. M. (thirteen hours) each day:

	Date	*Autos*	*Trucks*	*Pedestrians*	*Bicycles and Motorcycles*	*Wagons*	*Total*
Friday.	June 3	68	40	38	12	9	167
Saturday.	June 4	68	37	16	16	3	140
Sunday.	June 5	70	13	53	16	5	156

The Chief Engineer of the Board offered in evidence (R. 178) a traffic record at the same crossing for Friday, November 12th, and Saturday, November 13th, from 6 A. M. to 12 P. M., showing the following average use of the crossing: Pedestrians 17.5; automobiles 86; other vehicles 2.5; passenger trains 17.5; freight trains 35.5; light engines and drills 10 (Exhibit C. 5, R. side fol. 125 f, between pp. 170-171). Clear and unobstructed views of the Camp Lane crossing and of the vicinity are shown in Exhibit C. 4 (R. fol. 122, between pp. 170-171). There was no testimony whatever before the Board on the subject of danger to or impediment of highway travel at Camp Lane crossing, aside from what these exhibits may show.

The Width of the Highway.

Plan "C," as prepared and approved by the State Highway Commission (Exhibit "F," R. 145-150), provides for two roadways each having a clear width of 18 feet (Minutes of State Highway Commission, March 11, 1924) (R. 136). A certified copy of the road records, as recorded in the Somerset County Clerk's office (Exhibit "K," R. 159, l. 29), shows that the legal width of this highway is 33 feet (R. 36, 201). The traveled portion is an average of 20 feet in width and the improved modern pavement laid by the State Highway Commission thereon is 18 feet wide (R. 36). If the under-crossing is constructed to a width of 66 feet, according to the Board's plan, both abutments and half of the under-crossing will be on private property outside the limits of the highway.

In some other places not adjacent to the railroad the State Highway Commission has increased the width of this highway (R. 51). The State Highway Commission contemplates acquiring an additional 33 feet on either side of the railroad (R. 201) but has not done so yet.

In the center of the Borough of Somerville, but a few miles away, the new under-crossing recently constructed to carry this highway under the Central Railroad of New Jersey provides a space between abutments of 54 feet, with a roadway having a clear width of but 36 feet and two sidewalk spaces each having a clear width of 7 feet. That under-crossing is located in the center of the business section of Somerville and serves a large amount of local travel, since the railroad divides the borough and this is one of a limited number of crossings available for passing from one part of the borough to the other (R. 51, 52).

About a thousand feet away from the crossing in question (Royce Valley) at Dukes Corners, the State Highway Commission recently widened the highway on a sharp turn to 50 feet, of which it paved only 20 feet (R. 52).

Mr. Vanneman says that Plan "C," as originally offered by appellant before the Board as "Exhibit R. R. 1," provides for two lanes of traffic on each of the two roadways thereunder (R. 67). Both Mr. Vanneman (R. 67) and Mr. Diehl (R. 76) say the capacity of the highway will not be diminished by the proposed 6-degree curves, not only because that degree of curvature does not diminish capacity or speed, but also because the under-crossing itself is on a tangent and has straight approaches of 130 feet on one side and 245 feet on the other (R. 67, 75).

The Question of Economy.

Mr. Johnston and Mr. Hand, in their affidavits, show that Plan "C" as approved and adopted by the State Highway Commission, was estimated by the State Highway Engineer on March 11, 1924, at $109,024 (R. 136), and by the railroad engineers (including land and damages) at $145,024.47 (Exhibit "I," R. 155). The estimate of the Chief Engineer of the Board of Public Utility Commissioners on the Board's plan was $324,400 (R. 93). The estimate of the railroad engineers showed that Plan "C" could be changed so as to provide the same roadway and sidewalk spaces as the Board's plan for an additional $52,500 (Exhibit "I," R. 155). So that the difference in cost between Plan "C" and the Board's plan (using the railroad engineers' figures) was $179,375.53 or $124,875.53, according to whether we figure on Plan "C" as approved and adopted by the State Highway Commission, or as enlarged to provide the same roadway and sidewalk spaces as shown on the Board's plan.

Mr. Hand, who, as Chief Engineer of the plaintiff, has full charge and supervision (and responsibility) of all engineering and construction projects on the entire railroad, and who is familiar with the crossing and with Plan "C" and the Board's plan, says, in his affidavit, that the Board's plan is a wasteful extravagance of the plaintiff's

earnings which should be conserved for use in furnishing safe, adequate and proper transportation facilities and for improvements necessary, within the limits of reasonable economy, for public safety and convenience (R. 58). If the Board's plan is carried out, it will involve a reckless and useless waste of from $120,000 to $170,000 of money which will benefit nobody, and to that extent will prevent the plaintiff from providing safe, adequate and proper service and from making reasonable expenditures for necessary public improvements. The plan ordered by the Board is one which he could not recommend to or justify before the directors or stockholders of his company as a reasonable and necessary project, because of the unnecessary and excessive expense involved therein. The necessity for economy in each and every grade crossing elimination project, regardless of its individual cost, is shown by the schedule of grade crossings on his railroad which he gives in his affidavit (R. 60). In the order of their importance (as to danger and impediment to public travel), if eliminated by reasonable and economic means and plans, would cost in the neighborhood of $108,000,000, or for the most dangerous (Class A) about $24,500,000; for the next dangerous (Class B) about $27,000,000; for the least dangerous (Class C) about $58,000,000 (R. 60).

Mr. Diehl, in his affidavit, says that the basis of all improvements, whether it be by steam, water or highway, is the question of economy of construction and maintenance, which is always taken into account in designing and carrying out such improvements. The question of the justification of such an expenditure depends largely on the cost per mile, and in practically every instance where he has constructed a highway, whether it has involved the elimination of grade crossings or not, careful consideration has been given to the amount of travel and the justification for the expenditure. In the construction of highways and in the elimination of grade crossings, the slogan has been generally adopted that highway dollars must pay

their way and they should not be squandered in the construction of roads or in building for highway travel by unreasonable or unnecessarily expensive plans or designs, any more than for any other means of transportation (R. 76, 77).

He cited the case of the Main street crossing in Buffalo, where he, as the engineering representative of the public authorities, recommended, and the Public Service Commission of New York State ordered, the elimination of a 25-degree grade crossing on an important highway having four 10-foot traffic lanes, by changing the highway from a straight road to a new location having reverse 6-degree curves, with a 45-degree under-pass, in order to greatly reduce the cost (almost cutting the cost in half) (R. 77, 78).

If the introduction of 6-degree curves at the Royce Valley crossing (the one here in question), according to Plan "C," would, as appears from the estimates, result in the saving of $120,000 or more, he is of the decided opinion that such curvatures should be adopted (R. 78).

In the case of another Broadway crossing, near Buffalo he recommended and caused the adoption by the Public Service Commission of New York State of a plan for eliminating a grade crossing on a straight highway by introducing 6-degree curves, in opposite directions, in substantially the same manner as proposed by Plan "C," for "good and sufficient reasons, namely, reasons of economy" (R. 81).

Mr. Diehl gives five different reasons for the introduction of curves on highways. Every one of those reasons are founded upon considerations of economy (R. 83).

Mr. Vanneman, in his affidavit, says that he is familiar with several instances (some of which he mentioned) in which he has supervised and approved plans for grade crossing elimination on state highways in New York similar to the method proposed by Plan "C," where similar

curves have been introduced in straight highways for the sake of economy. The reason for using such curves is that it reduces the skew angle of the bridge, thereby shortening the length of the span, and makes a material reduction in the cost of the improvement (R. 69, 70).

At the Broadway crossing, near Buffalo, which was on one of the most important east and west trunk highways in the State of New York, the Public Service Commission of that state, on his recommendation, ordered a plan which diverted the highway and changed a skew angle of 20 degrees on a straight highway to a 45-degree angle undercrossing with reverse 6-degree curves, resulting in a great deal of saving of expense (R. 66).

He considers that it is necessary and advisable in grade crossing eliminations to consider the question of economy in construction where the resulting conditions will not be dangerous or detrimental to the public and that practice is followed by him and the New York Public Service Commission (R. 66, 67). He usually expects to eliminate crossings of the character here involved for $125,000 (R. 70).

The reason why he is careful to consider economy in improvements of this kind is that he would hate to spend money recklessly for such a purpose. In the State of New York the statute divides the expense 50 per cent. to the railroad and 50 per cent. to the state and municipalities, so that questions of economy are important to the public as well as to the railroad companies, curves are introduced primarily not because of the topography of the country, but because it is a question of keeping the cost down as low as possible consistent with safety (R. 70).

Under the practice in New York State, under his direction, he would introduce curves to eliminate a crossing on a straight highway if he could save twenty or thirty thousand dollars thereby, working on the principle that every dollar he can save in that way can be applied toward the elimination of some other grade crossing (R. 71).

APPENDIX "B."

CHAPTER 57.

A Supplement to an act entitled "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April twenty-first, one thousand nine hundred and eleven.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Whenever a public highway and a railroad cross each other at the same level and it shall appear to the board that such crossing is dangerous to public safety, or that the public travel on such highway is impeded thereby, the Board of Public Utility Commissioners may order the company operating such railroad, within such time as said board may fix, to alter such crossing according to plans to be approved by said board, by substituting therefor a crossing not at a grade of such public highway either by carrying such public highway under or over such railroad, or by reconstructing such railroad under or over such public highway, or by vacating, relocating or changing the lines, width, direction or location of such highway and the opening of a new highway in the place of the one ordered vacated.

2. The entire expense of such alterations, changes, relocation or opening, including damages to adjacent property, shall be paid by such railroad, unless a street railway uses such crossing, in which event the board may order not exceeding ten per centum of such expense directly chargeable to the crossing used by the street railway company, to be paid by the company operating such street railway and the balance to be paid by the company operating such railroad.

3. The expense of removing relaying or relocating any municipal water or sewer pipes or other municipal pipes, conduits or subways, shall be borne by the municipality owning the same and also the expenses of paving, curbing and flagging the highway constructed as the result of the change of grade.

4. Where the order of said board shall require changes in, or the removal of the property or constructions of any telegraph, telephone, gas, electric, lighting, power, water, oil, pipe lines or other company or corporation, copartnership or individual, they shall, at their own expense, move or change the grade or location of their property or constructions in conformity with the order of said board. They shall be deemed parties in interest and shall be given notice of hearing and an opportunity to be heard.

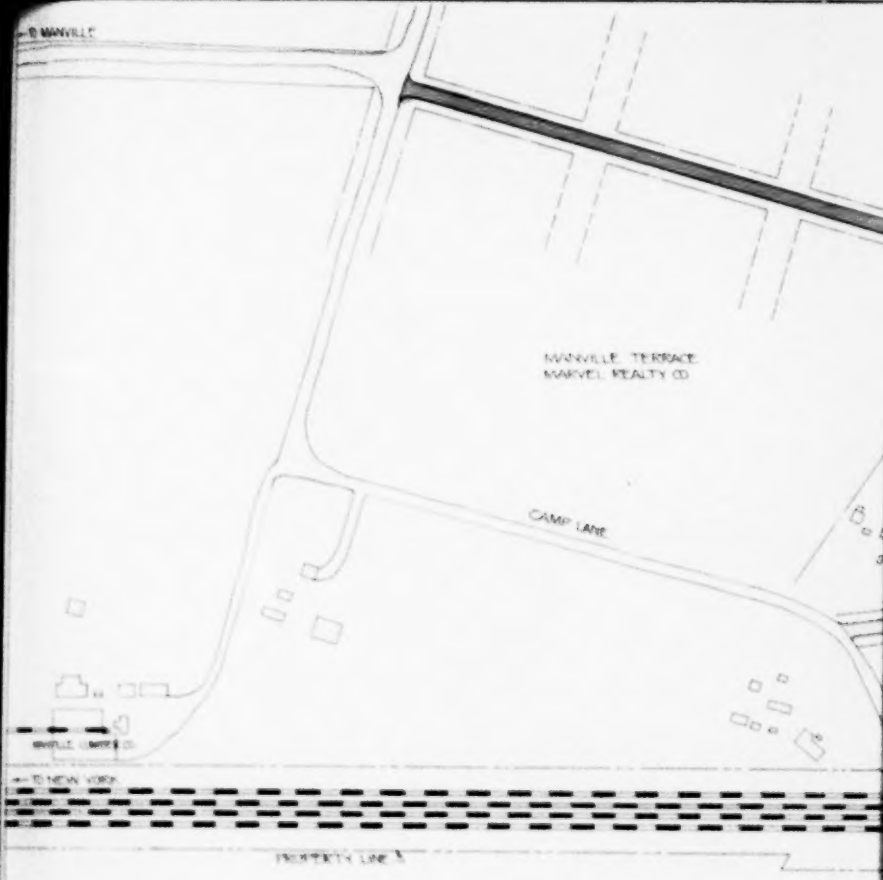
5. The board or body having charge of the finances of any municipality wherein any such crossing exists, may present to the Board of Public Utility Commissioners a petition in writing setting forth the facts upon which relief under this act is sought, or upon the petition of any railroad company whose tracks cross or are crossed at grade, or said Board of Public Utility Commissioners may, of its own motion, proceed with respect to any such crossing; whereupon said Board of Public Utility Commissioners shall fix a time and place for a hearing before it and shall give such notice thereof as it shall deem reasonable to the municipality and corporations, copartnership or individuals interested therein and after such hearing shall determine or order what, if any, alterations to or changes in or connected with such crossing and public highway shall be made.

6. All the powers, supervision, regulation of, jurisdiction and control over public utilities granted by the act to which this is a supplement, are hereby vested in the Board of Public Utility Commissioners and courts of this

State as may be necessary to carry the provisions of this act into effect.

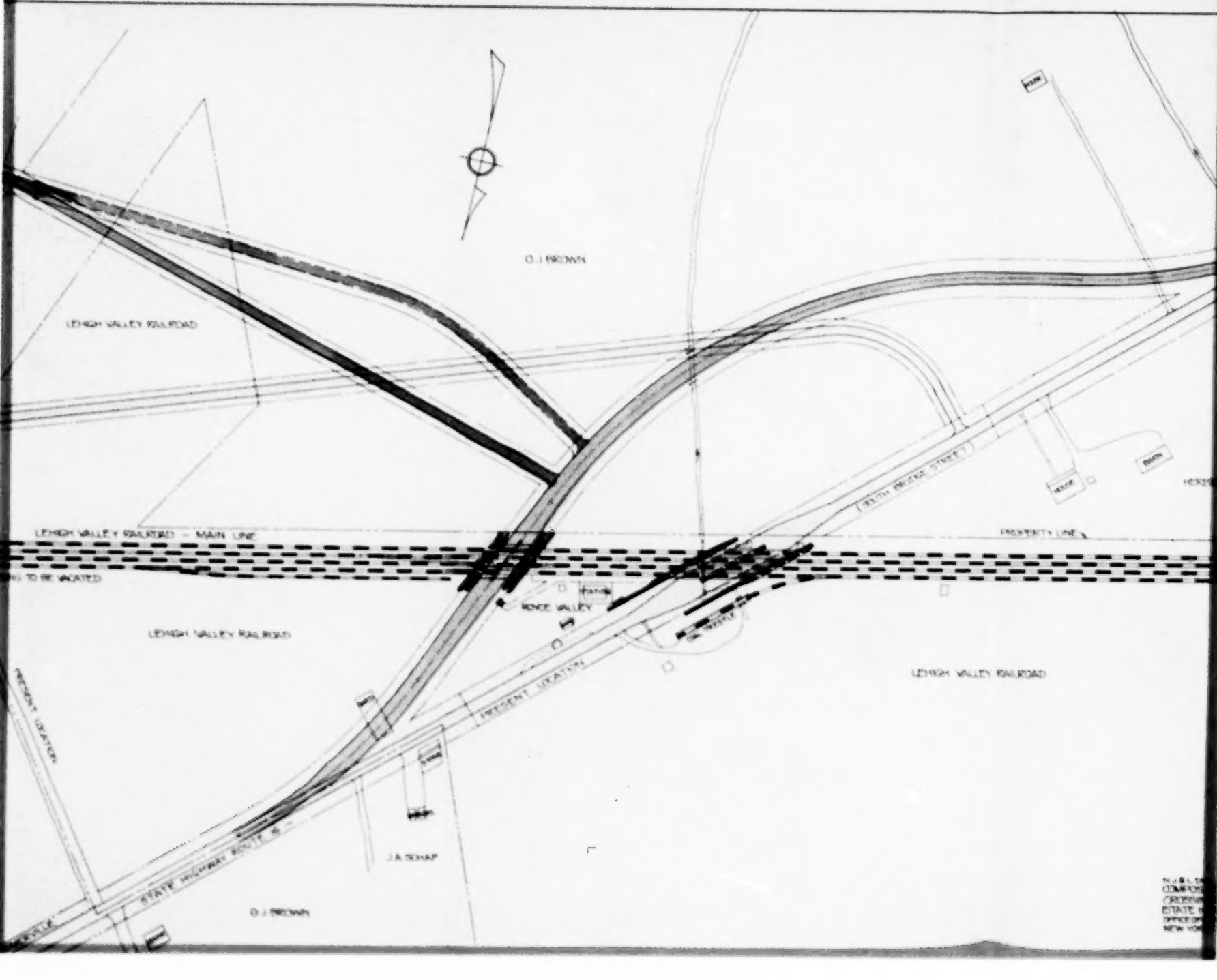
7. This act shall take effect immediately.

Approved March 12, 1913.

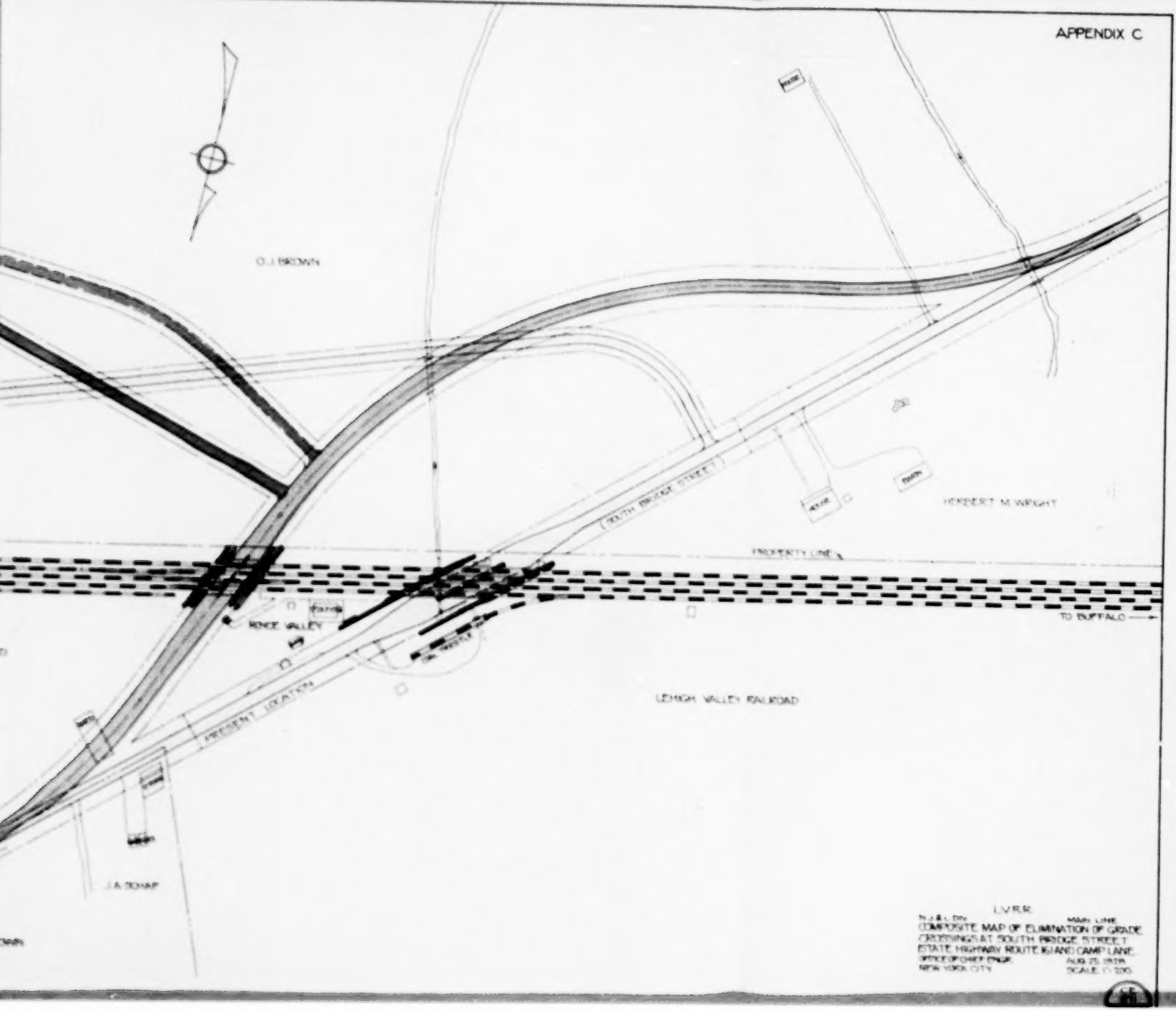


LEGEND

COLOR INDICATION	PLAN	EXHIBIT BEFORE BOARD	EXHIBIT HEREIN	RECORD REFERENCE
YELLOW	BOARD'S PLAN	P.B.	PART OF A	R.(N.J.T.)
RED	PLAN C	BR 1	C	R.(2)
BLUE	CAMP LANE	BR 2	G	R.(5)
BROWN	CAMP LANE (REVISED)	BR 3	G	R.(5)
GREEN	PLAN C ENLARGED	-	(NO EXHIBIT)	R.(3)


O.J. BROWN
LEHIGH VALLEY RAILROAD
LEHIGH VALLEY RAILROAD - MAIN LINE
PROPERTY LINE
TO BE VACATED
RENCE VALLEY
LEHIGH VALLEY RAILROAD
LEHIGH VALLEY RAILROAD
PRESENT LOCATION
PRESENT LOCATION
J.A. BEHAP
STATE HIGHWAY ROUTE 6
O.J. BROWN

APPENDIX C


O. J. BROWN
SOUTH BRIDGE STREET
HERBERT M. WRIGHT
PROPERTY LINE
TO BUFFALO
ROYCE VALLEY
PRESENT LOCATION
LEHIGH VALLEY RAILROAD
J. A. SCHAP
L.V.R.R.
MAIN LINE
COMPOSITE MAP OF ELIMINATION OF GRADE CROSSINGS AT SOUTH BRIDGE STREET, STATE HIGHWAY ROUTE 80 AND CAMP LANE
AUG. 25, 1928.
SCALE 1" = 200'
NEW YORK CITY